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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, APPELLANT

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK, AND THE BANK OF COMMERCE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a–37a) is reported at 255 F. Supp. 273. The opinion denying the government's motion to reconsider and vacate (App. C, *infra*, pp. 39a–41a) is unreported.

JURISDICTION

The final judgment of the district court (App. B, *infra*, p. 38a) was entered on June 15, 1966. The notice of appeal was filed August 12, 1966. By successive orders, the lower court extended the time for the government to docket the case and file its jurisdic-

tional statement in this Court to and including January 31, 1967. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29; *United States* v. *Loew's Inc.*, 371 U.S. 38.

QUESTION PRESENTED

Whether the Federal Reserve Board's approval, under the Bank Holding Company Act of 1956, of a bank holding company's acquisitions of banks, immunizes such acquisitions from challenge by the United States in a suit under Section 7 of the Clayton Act.

STATUTES INVOLVED

Sections 7 and 15 of the Clayton Act, 38 Stat. 731, 736, as amended, 15 U.S.C. 18, 25; pertinent portions of the Bank Holding Company Act of 1956, 70 Stat. 133, 12 U.S.C. 1841 *et seq.*; and of the Act of July 1, 1966, P.L. 89-485, 80 Stat. 236, which amends the Bank Holding Company Act, are set forth in Appendix A, *infra*, pp. 39a-54a.

STATEMENT

This action was instituted by the United States on March 2, 1961, to challenge, as unlawful under Section 7 of the Clayton Act (38 U.S.C. 18), the acquisition by Bank Stock Corporation of Milwaukee (Bancshares), a bank holding company, of the second, fourth and tenth largest banks in the City of Milwaukee, Wisconsin. After a trial on the merits

in 1968; the district court on June 16, 1965, dismissed the complaint for lack of jurisdiction (p. 208, infra).

The complaint alleged that Bankstock had acquired more than 80 percent of the outstanding voting stock of each of the remaining appellees—the Marshall & Ilsley Bank ("Marshall"), the Northern Bank ("Northern"), and The Bank of Commerce ("Commerce"). It also alleged that the commercial banking market in the City and County of Milwaukee had become highly concentrated, particularly as a result of acquisitions by bank holding companies. By 1961 three holding companies, including Bankstock, had acquired control of seven formerly independent banks in Milwaukee County and five banks in the City. As of June 1962, the four largest banks accounted for approximately 90 percent of the total bank assets, deposits, loans and discounts in the city, and approximately 72 percent of these items in the county. At that time Marshall was the second largest bank in Milwaukee with assets in excess of $250 million. Northern was the fourth largest bank with assets of more than $150 million, and Commerce was approximately the tenth largest bank with assets of almost $20 million. Prior to their acquisition, the three banks competed with each other and with other banks. As a result of the acquisitions Bankstock obtained control of banks with 22.38 percent of total assets, 22.39 percent of total deposits, and 22.42 percent of loans and discounts in the city (App. p. [illegible]; [illegible]).

Each of the acquisitions had been approved by the Board of Governors of the Federal Reserve System

under the Bank Holding Company Act of 1956 (12 U.S.C. 1841–1848; 45 F.R.B. 1134; 47 F.R.B. 160). No hearing was held by the Board with respect to any of the acquisitions, it did not purport to apply Section 7 of the Clayton Act, and its orders approving them were not challenged in the courts of appeals.[1]

The case was tried on the merits in June, July and November 1963. In April 1966, the district court *sua sponte* requested the views of the parties as to the history and effect of the Bank Holding Company Act of 1956. On June 15, 1966, the court dismissed the complaint for lack of jurisdiction. It held that Section 15 of the Clayton Act, which confers jurisdiction upon district courts to restrain violations of the Act on complaint by the United States, had been "plainly supplanted" by the Bank Holding Company Act of 1956. The court said that the 1956 Act conferred exclusive jurisdiction to enforce Section 7 against bank holding company acquisitions in the Board of Governors of the Federal Reserve System, which was to exercise this power when it considered applications for approval of bank stock acquisitions under the Act. Once approved, such acquisitions could be questioned only on review of the Board's decision in the courts of appeals.

[1] Chairman Balderston and Governor Robertson dissented from the Board's decision approving the acquisitions of Marshall and Northern on the ground that considerations which outweighed the significant anticompetitive effects of the transaction had not been shown. 45 F.R.B. 1134, 1136. Governors Szymczak and Robertson dissented on similar grounds from the Board's approval of the Commerce acquisition. 47 F.R.B. 160, 162.

On July 1, 1966, the Bank Holding Company Act was amended by P.L. 89-485, 80 Stat. 236, so as to incorporate provisions similar to those in the Bank Merger Act of 1966, 80 Stat. 7. Section 11(c) provided that the substantive standards of the 1966 amendments were to be applied in any pending antitrust case filed by the Attorney General against bank holding company acquisitions. After a notice of appeal had been filed in this case, the government filed a motion in the district court requesting reconsideration in light of the subsequently enacted legislation. On November 17, 1966, the district court said that if the case were remanded to it, it would deny the government's motion for reconsideration (App. C. *infra*, pp. 39a-41a).

THE QUESTION IS SUBSTANTIAL

The court below construed the Bank Holding Company Act of 1956 inconsistently with its language and legislative history and with this Court's decisions regarding the antitrust consequences of merger approval by independent regulatory agencies. The Act has since been amended, and its language now manifests even more clearly Congress' wish not to immunize acquisitions which have been approved by the Federal Reserve Board from a Section 7 action brought by the United States. The effect of the judgment below, however, is to leave standing a combination of banks which has a very substantial anti-competitive effect on the banking industry in one of the nation's major metropolitan areas.

1. Under the terms of the 1956 Act (pp. 50a-51a, *infra*), bank holding companies may acquire banks

only with the approval of the Federal Reserve Board. In determining whether to approve an acquisition, the Board is directed to consider the financial history and condition of the company and the acquired banks, their prospects, the character of their management, the convenience, needs and welfare of the affected communities and "whether or not the effect of such acquisition * * * would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking" (p. 51a, *infra*). The court below concluded that by giving the Federal Reserve Board the power, in acquisition applications, to consider "the preservation of competition in the field of banking," Congress assigned to the Board the exclusive power to enforce Section 7 of the Clayton Act with respect to bank holding company acquisitions. We note preliminarily that in approving the acquisitions involved here the Board did not purport to exercise any jurisdiction under Section 7. At all events, the conclusion of the district court that the Board was given exclusive power by the 1956 Act is erroneous.

a. The Act confers no express antitrust immunity for acquisitions approved by the agency. Compare the Federal Aviation Act, 49 U.S.C. 1384; Federal Communications Act, 47 U.S.C. 221(a), 222(c); Interstate Commerce Act, 49 U.S.C. 5(11), 5b(9), 22; Shipping Act, 46 U.S.C. 814; and the Webb-Pomerene Act, 15 U.S.C. 62, all of which contain such immunizing provisions. Indeed, Congress spelled out as clearly as it could that no immunity was intended.

Section 11 of the Bank Holding Company Act of 1956 provides:

> Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

The court below adverted to this "sayings clause" and to the fact that it did not appear in the versions of the legislation which had originally been introduced in Congress (pp. 10a, 35a, *infra*). But the court failed to explain why on its face this clause does not authorize the United States to maintain an antitrust suit challenging a bank holding company acquisition despite its approval by the Board. We submit that it was plainly the purpose of that provision to preserve the dual system of Clayton Act enforcement recognized by the district court (p. 4a, *infra*), which had been the rule with respect to banking under Sections 11 and 15 of the Clayton Act, 15 U.S.C. 21, 25. Section 11 of the Clayton Act confers jurisdiction on the Federal Reserve Board and on four other administrative agencies—the Interstate Commerce Commission, Federal Communications Commission, Civil Aeronautics Board, and Federal Trade Commission—to enforce the provisions of the Clayton Act in the industries they regulate. This jurisdiction is not exclusive, but is parallel to and concurrent with the authority of the United States to enforce these provisions in the district courts under Section 15. Cf. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597.

The legislative history of the 1956 Bank Holding Company Act compels this conclusion. That history shows that the Act was intended to provide more effective control of bank acquisitions and to reduce the possibility of harmful concentrations in banking by providing a system of pre-acquisition screening. Congress' manifest purpose was to strengthen and supplement existing remedies, not to repeal them. See S. Rep. No. 1095, Pt. 1, 84th Cong., 1st Sess., Pt. 2, 84th Cong., 2d Sess.; H. Rep. No. 609, 84th Cong., 1st Sess. Referring to the savings clause, the Senate Committee expressly observed (S. Rep. No. 1095, Pt. 1, 84th Cong., 1st Sess., p. 19):

> In the opinion of your committee, approvals granted and action permitted under the provisions of this bill are not to supersede the provisions of other Federal laws, particularly those designed to control monopoly or break up trusts. For example, the Clayton Act has been judicially determined to apply to banks. Under the provisions of that act, the Federal Reserve Board has an administrative role to play in determining whether banks comply with the requirements of the Clayton Act. Under the provisions of this bill, any action taken by the Federal Reserve Board in accordance with its terms is not to interfere in any manner with the performance by the Board of such functions as may be assigned to it under the Clayton Act.

The only "functions * * * assigned to [the Federal Reserve Board] under the Clayton Act" are the enforcement powers specified in Section 11 of that statute, 15 U.S.C. 21. The above excerpt from the Senate Report demonstrates that the court below erred in construing the Bank Holding Company Act of 1956

as "in effect repeal[ing] § 15 of the Clayton Act" (p. 28a, *infra*). For just as Congress intended to retain the distinct power of the Board under the Clayton Act to enforce the provisions of Section 7, it also intended to retain the concurrent powers assigned to the Department of Justice by the Clayton Act.

Congress could not have intended otherwise, for the standard which it prescribed in 1956 for the Board's consideration of acquisition applications relates principally to enumerated banking factors and to broad public-interest criteria. To be sure, competition in the banking industry was included as one element bearing upon public interest, but the Act did not require the Board to consider it by Section 7 standards. Nor, in fact, did the Act require that the Attorney General, who has principal responsibility for enforcement of the federal antitrust laws, be given notice of the proceeding or an opportunity to present his views. See note 3, p. 11, *infra*. It is highly unlikely that in enacting a statute designed to preserve competition in banking, Congress would have granted to an administrative agency the exclusive power to pass on antitrust issues without even according a hearing in which the antitrust considerations could be presented.

c. The 1966 amendments to the Bank Holding Company Act further reinforce our interpretation of the 1956 Act. The 1966 amendments (P.L. 89-485, 80 Stat. 236) do not expressly confer jurisdiction on the district courts to decide suits by the United States challenging holding company acquisitions under Section 7. But it is quite obvious from Section 11 that

Congress assumed that such authority existed. Subsection (b) provides a 30-day limitation for "any action brought under the antitrust laws," specifies that "in any such action, the court shall review de novo the issues presented," and sets forth a substantive standard to be applied "in any judicial proceeding attacking * * * any transaction * * * on the ground that such transaction alone and of itself constituted a violation of any antitrust laws other than Section 2 [of the Sherman Act]." Subsection (c) provides for appearance by the Board and any State banking agency "as a party" to "any action brought under the antitrust laws * * *." And subsection (e) provides: "Any court having pending before it on or after the date of enactment of this amendment any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition * * *" is to apply the newly enacted substantive standards. The antitrust litigation contemplated by the 1966 provisions is obviously the litigation authorized by Section 4 of the Sherman Act or Section 15 of the Clayton Act. If the court below were correct in its conclusion that the Bank Holding Company Act of 1956 had repealed this jurisdiction, the above provisions—which are at the heart of the 1966 amendments—would have been purposeless.

d. Congress did not, we submit, diminish the powers of the Department of Justice under the Clayton Act when it enacted the Bank Holding Company Act of [illegible]. This follows from this Court's decision in [illegible] *v. Philadelphia National Bank*, 374 U.S. 321, 350–355, where the same claim was made with respect to the Bank Merger Act of 1960, 12

U.S.C. 1823. The latter statute—as the court below noted (p. 9a, *infra*)—did not even contain the savings clause which so clearly manifests Congress' intent here. Nonetheless, this Court rejected the claim that the Comptroller of the Currency's statutory obligation to consider anticompetitive effects in determining whether to allow a bank merger was intended to give him the exclusive obligation of deciding the lawfulness of such a merger under Section 7. The considerations regarding the banking industry (374 U.S. at 352) stated by the Court in the *Philadelphia Bank* case and its analysis of the doctrine of primary jurisdiction (374 U.S. at 353–354) and of the overlapping objectives of legislation in this area (374 U.S. at 354–355) apply here in full force.

Nor is there substance to the differences between the 1956 and 1960 Acts relied on by the court below. Although it is true that the Bank Merger Act did not require the Comptroller to hold any hearings (p. 6a, n. 4, *infra*) and that it did not expressly provide for judicial review (p. 7a, n. 6, *infra*), those considerations do not adequately distinguish the *Philadelphia Bank* case from this one. For the Federal Reserve Board also has no obligation under the 1956 Act to conduct a hearing unless the Comptroller of the Currency or the State banking authorities express disapproval of the proposed acquisition (12 U.S.C. 1842(b); p. 5a, *infra*); the Attorney General is given no right to demand a hearing or even to be notified.[1]

[1] The district court suggested that the Department of Justice had "acquiesced" in the Marshall and Northern acquisitions by failing to submit its views during the Board proceeding (p. 30a, *infra*). Similar contentions were rejected in *United States* v. *Ra-*

And the Court in the *Philadelphia Bank* case did not rely on the unavailability of judicial review. Indeed, after noting that there was "no specific provision for judicial review," the Court "intimate[d] no view" on whether review might be available in the absence of such a provision. 374 U.S. at 351, n. 30.

2. The decision of the court below was also inconsistent with the well-established principle that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350, and authorities cited *id.* at n. 28; see *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213. In comparable cases, this Court has held that even though an agency is given the power to weigh competitive factors in determining whether to approve a merger or acquisition—and even if its approval is subject to judicial review—its approval does not immunize the transaction from an independent antitrust proceeding. *United States* v. *Radio Corporation of America*, 358

dio Corporation of America, 358 U.S. 334, where the Court noted that the Federal Communications Commission was not even obliged to inform the Department of Justice of potential antitrust problems. 358 U.S. at 352, n. 20. In *California* v. *Federal Power Commission*, 369 U.S. 482, the Department of Justice expressly declined to appear before the agency. 369 U.S. at 484. In this case the Federal Reserve Board was not required to, and in fact did not, inform the Antitrust Division of Bankstock's application for approval of the Marshall and Northern transactions. Section 11(b) of the 1966 amendments requires the Board to notify the Attorney General of any approval by it of a proposed acquisition and any action brought under the antitrust laws arising out of an acquisition stays the effectiveness of the Board's approval, unless the antitrust court specifically orders otherwise.

U.S. 334, 346, 350–351; *California v. Federal Power Commission*, 369 U.S. 482, 484–485, 487–488.

The decision in *Whitney Bank v. New Orleans Bank*, 379 U.S. 411, on which the district court relied heavily (pp. 31a–36a, *infra*), is inapposite. The *Whitney Bank* case was not an antitrust proceeding and no question of the implied repeal of Section 15 of the Clayton Act was involved. In that case the Court held only that the Federal Reserve Board had "original exclusive jurisdiction" over other issues arising in the administration of the statutory standards prescribed by the Bank Holding Company Act of 1956.

3. We have discussed the merits of the question presented in greater detail than we would ordinarily do in a Jurisdictional Statement because we believe that the court below plainly erred in its conclusion that it had no jurisdiction to consider the merits of this Section 7 action. Since this is the only pending antitrust suit attacking acquisitions by a bank holding company, and since in future actions the courts will have the benefit of the congressional intent expressed by the 1966 amendments, the legal issue presented here may be of limited importance. The litigation in which it arises, however, is of substantial significance because it affects an influential industry in one of the nation's large metropolitan centers. The holding company which has made the acquisitions also contemplates further concentration in that market.* A full

* Defendants testified at trial that they contemplated four additional acquisitions in the Milwaukee area, and that six independent banks have separately discussed with Bankstock and with its holding-company competitors the possibility of being acquired (Tr. 1282–1283; 777–782; 786–788; Gov. Exh. GX–108).

trial has been held and the government is of the view that a Section 7 violation has been proved. Under the Expediting Act, this Court is the only one in which the plain error of the district court on the threshold jurisdictional issue can be remedied so that the case can return to that court for expeditious consideration of the merits.

CONCLUSION

For the foregoing reasons we respectfully submit that this Court should note probable jurisdiction.

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JANUARY 1967.

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 61-C-54

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK AND THE BANK OF COMMERCE, DEFENDANTS

OPINION

On March 2, 1961, the United States of America filed a complaint in this court against Bank Stock Corporation of Milwaukee, now Marshall & Ilsley Bank Stock Corporation, Marshall & Ilsley Bank, Northern Bank and The Bank of Commerce, all Wisconsin corporations, alleging that the cumulative effect of acquisitions by Bank Stock of more than 80% of the outstanding voting stock of Marshall & Ilsley Bank and Northern in December of 1959 and of 80% or more of the outstanding common stock of Commerce in January of 1961 may be substantially to lessen competition or to tend to create a monopoly in commercial banking in the City and County of Milwaukee in violation of § 7 of the Clayton Act (Title 15 U.S.C. § 18), and asking that Bank Stock be adjudged to have violated that section, be required to divest itself of the stock unlawfully acquired, and be enjoined from acquiring stock in any other com-

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mercial bank in Milwaukee County without court approval.[1] Preceding this action and the acquisitions complained of, the Board of Governors of the Federal Reserve System, acting pursuant to the Bank Holding Company Act of 1956, had approved the applications of Bank Stock to become a bank holding company and to acquire the stock of Marshall & Ilsley Bank, Northern and Commerce.

The defendants' answer to the complaint was filed on May 22, 1961; trial was held in June, July and November, 1963; briefs were filed, the last being briefs requested by the court and filed in May of 1966, oral argument was heard, and the court is prepared to render its decision.

Reflecting as it does disagreement between two executive agencies, both charged with the duty of enforcing § 7, as to the advisability and propriety of acquisitions of bank stock by a bank holding company, this case arises in a maze of legislative and judicial pronouncements relative to jurisdiction. Our examination of those authorities convinces us that this court has no jurisdiction under § 15 of the Clayton Act (Title 15 U.S.C. § 25), the jurisdictional basis relied upon by the plaintiff, to enjoin or undo stock acquisitions by bank holding companies which must be or have been approved by the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 and that the jurisdiction of district courts under § 15 of the Clayton Act to enforce § 7 of that act against such bank holding company acquisitions on complaint of the United States has

[1] This prior approval, if required, would be the second approval since, as will later appear, approval of any substantial acquisition must be obtained from the Board of Governors of the Federal Reserve System.

been "plainly supplanted" by the Bank Holding Company Act of 1956. This conclusion is not to be interpreted as a ruling that § 7 is inapplicable to bank holding companies. Rather, it means that the Board of Governors of the Federal Reserve System alone can apply and enforce that section against bank holding company acquisitions which it is asked to approve under the Bank Holding Company Act of 1956, and must do so in ruling on applications under that Act. A discussion of the authorities which compel this conclusion follows.

The Clayton Act, § 7, 11 and 15 of which here concern us, became law in 1914. Paragraph 2 of § 7 thereof provided:

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

and remained unchanged until 1950 when it was amended to read as follows:

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in

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[1] *United States* v. *Philadelphia National Bank* (1963) 374 U.S. 321 at 344, Footnote 22.

> any section of the country, the effect of such acquisition of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This amendment, while substantial, is not relevant to the jurisdictional problem here presented.

Unquestionably, banks and bank holding companies fall within the purview of § 7 as originally enacted and as amended. *Transamerica Corp.* v. *Board of Governors* (C.A. 3, 1953) 206 F. 2d 163, *United States* v. *Philadelphia National Bank, supra.* The authorities do not so clearly reveal, however, the manner in which § 7 must be enforced.

The Clayton Act as originally passed, provided a system of dual enforcement of § 7 as to banks, banking associations and trust companies. § 11 thereof (Title 15 U.S.C. § 21) vested authority to enforce compliance with § 7 in the Federal Reserve Board where applicable to banks, banking associations and trust companies, directed the Board to commence proceedings pursuant to that authority if it had reason to believe § 7 was violated, and set forth the procedure to be followed. § 15 conferred jurisdiction to prevent and restrain violations of § 7 on district courts of the United States and imposed a duty on United States district attorneys, under the direction of the Attorney General, to institute proceedings to prevent and restrain such violations. Both sections were thereafter amended in particulars not here material.

On this thus far fairly uncomplicated legislative scene appeared the Bank Holding Company Act of 1956 (Title 12 U.S.C. § 1841 - § 1848) which became law on May 9, 1956. This Act which at various stages in its legislative history was referred to as a bill "To

define bank holding companies, *control their future expansion*, and require divestment of their nonbanking interests" (emphasis ours) prohibited in relevant part formation of bank holding companies, as defined in the Act, and acquisitions by bank holding companies of a certain percentage of the voting shares of any bank without prior approval of the Board of Governors of the Federal Reserve System.[1] The manner in which approval is to be sought is set forth in Paragraph (b) of § 3 of the Act (Title 12, U.S.C. § 1842(b)), as follows:

> (b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the

[1] This provision is unlike the Bank Merger Act of 1960 considered by the United States Supreme Court in *Philadelphia Bank* which assigned roles in bank merger applications, depending on the nature of the institution, to either the Board, the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, the latter two of which have no enforcement power whatsoever under the Clayton Act.

applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.[4]

The factors to be considered by the Board in granting or denying approval are set forth in Paragraph (c) of § 3 as follows: (Title 12, U.S.C. § 1842(c))

(c) In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.[5]

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[4] In contrast, the Bank Merger Act of 1960 involved in *Philadelphia Bank* provided for no hearing whatsoever.

[5] These tests are not unlike those set forth in the Bank Merger Act involved in *Philadelphia Bank* which provided: (Title 12, U.S.C. § 1828(c))

"* * * In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the

Section 9 of the Bank Holding Company Act of 1956 as amended, provides for judicial review as follows: (Title 12, U.S.C. § 1848)

> Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

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case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. * * *

[8] The Bank Merger Act of 1960 contained no provision whatsoever for judicial review, a fact which, together with its lack of provision for hearing was considered significant by the Su-

§ 11 of the Act, the savings clause, provides:

> Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in vio-

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preme Court in *Philadelphia Bank* (See Page 351 of that opinion). When that Act was recently amended, provision for review similar to the Bank Holding Company provision was proposed. With respect to that provision, the Attorney General stated in the letter of September 24, 1965, referred to previously: (Page 342, 1966 U.S. Code Congressional and Administrative News)

"I am opposed to particular procedures set forth in H.R. 11011. The bill provides for review in a court of appeals on the basis of a 'record' upon which the order complained of was entered, and further provides that on review, the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be no little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.

"Consequently, while I am sympathetic to efforts to clarify through legislation the application of antitrust law to banks, I believe that the current practice, whereby the Department of Justice institutes proceedings in Federal district courts against mergers which it believes to be unlawful, should be allowed to continue; so that there could be a trial de novo of all issues in any such suit."

lation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct."

From the foregoing it can be seen that many problems of statutory construction relating to jurisdiction exist in this case that have not been settled by the *Philadelphia Bank* decision, which decision was concerned with the Bank Merger Act and in no way con-

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This statement seems to us to clearly infer the Attorney General's belief that such a provision for review such as in the Bank Holding Company Act would abolish the duty of the Attorney General under § 15 of the Clayton Act to commence an action in district court concerning approved bank mergers and, consequently, the jurisdiction of the court to entertain such an action.

Although counsel for the plaintiff here has argued that the factors set forth in §3 differ from the considerations under §7 of the Clayton Act, the Attorney General himself, in commenting prior to recent amendment of the Bank Merger Act on that Act's similar factors, stated in a letter of September 24, 1965, printed in the 1966 U.S. Code Congressional and Administrative News at Page 340:

"While there are those in the banking industry and, indeed, in Government who differ with me, I strongly believe that objective analysis will disclose that in actual practice the differences in the standards applied by the banking agencies and by the courts, if any, have been overstated. In fact, the Supreme Court in the leading case has made it clear that all or most of the factors specified in the Bank Merger Act are relevant to a determination under section 7 of the Clayton Act or section 1 of the Sherman Act. * * *" (Page 341).

And in a letter dated January 5, 1966, printed at Page 346:

"* * * I should like to repeat here my strong belief that the differences, if any, in the standards applied to bank mergers by the courts and the standards applied by the agencies have been overstated. * * *" (Page 347).

The Bank Merger Act of 1960 had no savings clause.

sidered the substantially different Bank Holding Company Act. These problems are made more difficult by the fact that § 11 of the Bank Holding Company Act did not appear in the original bills and § 9 of the Bank Holding Company Act, providing for judicial review in the appropriate Court of Appeals with a substantial evidence test applying to findings of the Board, was substantially different from earlier proposals for review pursuant to the Administrative Procedure Act with trial de novo provided. Because this Court believed that the legislative history of the Bank Holding Company Act might prove of some aid in the solution of these problems, it recently asked the parties to furnish material and comments relating thereto, more particularly, relating to § 9 and § 11.

The legislative history of the Bank Holding Company Act reveals without question that in acting in this area Congress was motivated by a concern over concentration in banking and a desire to control bank holding company expansion and prevent monopoly in this field. For example, in the Report of the Senate Committee on Banking and Currency on this legislation, Senate Report No. 1095, 84th Cong., 1st Session (1955) the following statements appear:

> In the opinion of your committee, public welfare requires the enactment of legislation providing Federal regulation of the growth of bank holding companies. * * * (Page 1)
>
> * * * It is not the committee's contention that bank holding companies are evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities. The dangers accompanying monopoly in this field are particularly undesirable in view of the significant part played by banking

in our present national economy. * * * (Page 1)

* * * * *

Testifying before your committee for the Board of Governors of the Federal Reserve System, Chairman William McChesney Martin, Jr., stated:

"Existing provisions of law, originally enacted in the Banking Act of 1933, have proved entirely inadequate to deal with the special problems presented by bank holding companies. It has been, and still is, the Board's view that additional legislation is essential to deal effectively with these problems."

Chairman Martin noted that the principal problems in the bank holding company field arise from two circumstances:

(1). The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of commercial bank facilities in a particular area under a single control and management; * * * (Page 2)

* * * * *

Thus, under the bill, the growth of bank holding companies in the banking field would be regulated but not prohibited. (Page 2)

* * * * *

The committee is of the opinion that the bill now favorably reported to the Senate represents adequate and fair legislation to regulate the future expansion of bank holding companies. * * * (Page 4)

* * * * *

The factors required to be taken into consideration by the Federal Reserve Board under this bill also require contemplation of the prevention of undue concentration of control in the banking field to the detriment of public interest and the encouragement of competition

in banking. It is the lack of any effective requirement of this nature in present Federal laws which has led your committee to the conviction that legislation such as that contained in this bill is needed. Under its provisions, the expansion of bank holding companies in the banking field would not be prohibited, but would be regulated in the public interest. (Page 10)

* * *

The provisions of this bill, in the opinion of your committee, provide adequate safeguards so that the maintenance or expansion of such bank holding companies can be regulated in the public interest. (Page 10)

The Home Committee Report, House of Representatives Report No. 609, 84th Cong., 1st Session (1955) contains the following statements:

Your committee believes that the destruction of the American unit banking system, resulting in the further concentration of credit facilities, would have revolutionary effects upon our free-enterprise system. Ultimately, monopolistic control of credit could entirely remold our fundamental political and social institutions. (Page 2)

* * * * * * * *

Your committee is convinced from the evidence presented during its recent hearings that this bill represents the minimum legislation necessary to deal with the bank holding company problem. The committee wishes to make clear that the legislation which it proposes is not designed to abolish bank holding companies or to prohibit the expansion, within certain limits, of existing bank holding companies. The bill would impose controls which the committee deems desirable over the creation and expansion of bank holding companies. * * * (Page 11)

> The bill would control the future expansion of bank holding companies. The problem of how far bank holding company systems should be permitted to expand has long been of serious concern. It is in this area that one of the greatest potential evils of bank holding company operations exists. (Page 14)

Records of Committee and Subcommittee hearings on the legislation also reveal this Congressional concern and purpose. During the House Committee on Banking and Currency Hearings held on February 28, March 1, 2, 3, 4, 7, 8 and 9, 1955, William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System stated:

> In the first place, there is nothing in present law which restricts the ability of a bank holding company to add to the number of its controlled banks. Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation. (Pages 13–14)

And Representative Multer stated:

> Now what we are trying to do here now is to see what part, if any, of the antitrust laws, as they apply to banks, need correction or extension or revision. Isn't that the main purpose of this legislation? Isn't it into that field that we are actually delving? (Page 111)

> The point I was making was this: This legislation we have before us now is part and parcel of the antitrust theory of legislation. If that principle is good, we have got to work it out here, too, and see that it is made to work in this field of our economy as it works in the other fields. That is the thing we have got to keep in mind when we try to put this bill in shape. (Page 117)

And Representative Spence, Chairman of the Committee, stated:

> So competition is one of the most essential things in the banking business, and I think it should be encouraged, and I think this bill will do that. (Page 128)

During the Senate Subcommitteee Hearings of July 5, 6, 7, 11, 12, and 14, 1955, Chairman Martin stated:

> We believe, as we have said previously, that the principal problems in the bank holding company field arise from two circumstances:
>
> (1) The unrestricted ability of a bank holding company group to add to the number of its banking units, thus making possible the concentration of commercial banking facilities in a particular area under a single control and management; * * * (Page 44)

And in a written report on views of the Board of Governors of the Federal Reserve System added:

> (1) In the first place, there is nothing in present law which restricts the ability of a bank holding company to add to the number of its controlled banks. Consequently, there can well be situations in which a large part of the commercial banking facilities in a large area of the country may be concentrated under the management and control of a single corporation. (Page 75)

Floor debate in the House and Senate, appearing in Volume 101, Part 6 and Volume 102, Part 5 of the Congressional Record similarly disclose the intent of Congress, in enacting legislation dealing with bank holding companies, to prevent undue concentration or monopoly in banking. In Volume 101 at Page 8023, Representative Wolcott stated:

> Mr. Chairman, I think we should perhaps clear up, as far as we can, a little of the misunderstanding in respect to what the bill seeks

to accomplish. In the bill there is the usual declaration of policy. It is the policy, as explained by the esteemed chairman of the committee, the gentleman from Kentucky [Mr. SPENCE] that the primary purposes of the bill are to control the expansion and creation of so-called bank holding companies and separate banking from the nonbanking activities. They go on to say, however, that it is generally to maintain competition among the banks and to minimize the danger inherent in the concentration of economic power through centralized control of banks.

Representative Rains stated at Page 8030:

But we did not harken to the soothing sirup of those who cautioned delay. We satisfied ourselves, after long and conscientious study of the facts, that the loopholes in our banking laws which permit—rather, which encourage—the alarming growth of monopoly and concentration of control in banking should be closed, and promptly so. Thus this bill. Thus this recommendation of the Committee on banking and Currency to restore a greater measure of competition to banking. * * *

* * * * *

Mergers and extension of holding company influence into our banking system across State lines give us a frightening picture of concentration in this most fundamental area of our economy.

Representative O'Hara stated at Page 8034:

It is the policy of the Congress in the enactment of the proposed legislation to maintain competition among banks. It also is the policy to prevent a concentration of economic power in the giving of credits. I take it that there is no disagreement there.

Representative Marshall stated at Page 8034:

> By proper regulation and control of bank holding companies, the bill is intended to preserve the ideal of independent banking and prevent monopolistic centralization of credit.

Representative Brown stated at Pages 8037–8038:

> Mr. Chairman, unless something is done to control bank holding companies, there probably would result increased monopolistic concentrations of power in the financial world. Such concentrations of power in any field long have been characterized by their strong inclination to bad practices.
>
> We have witnessed in this country monopolistic developments in various fields. Our policy has always been to discourage them because they are diametrically opposed to our cherished system of free competitive private enterprise. This bill is designed to carry out this policy, and if it is necessary to amend the bill for such purpose, I hope no crippling amendments will be adopted. In a democratic way, we are merely urging rules for the game that will preserve our traditional freedoms. Monopoly in banking—the very lifeblood of all commerce—would bring in its wake vast political and financial influence. History has proven that the step from private monopoly to Government monopoly is short.

Representative Johnson stated at Page 8176:

> Mr. Speaker, I wish to say a few words in support of H.R. 6227, the bill to provide for control and regulation of bank holding companies. I believe this legislation is essential to prevent a most dangerous type of monopoly, the banking monopoly. In my opinion, the bank holding company device leads to uncontrolled branch banking, resulting in an undesirable concentration of economic power. Unless

restrictions, such as provided by H.R. 6227, are adopted, I think that the present system of independent, community banks will be endangered and ultimately banking will be in the hands of a few, with several superbank holding companies extending across the country.

The old saying, "An ounce of prevention is worth a pound of cure," is very applicable to the banking situation. I believe it is in the public interest that we check a banking monopoly before it gains a firm foothold and thus help to preserve our traditional American system of independent competitive banking.

(See also statement of Representative Multer to the Antimonopoly Subcommittee of the House Judiciary Committee reprinted at Pages 8052–8057.)

In Volume 102, Senator Robertson introduced a statement at Pages 6750–6751, containing the following:

S. 2577, the bank holding company bill, which will be on the Senate Calendar when Congress convenes in January, represents the culmination of 18 years of effort to control expansion of bank holding companies and to require such companies to divest themselves of nonbanking investments.

* * * * *

Our bill recognizes that bank holding companies are legitimate business organizations entitled to fair and equitable treatment, but that they should be subject to proper regulation by the Federal Reserve Board to prevent unfair competition and undue concentration of banking activities.

Senator Capehart stated at Page 6854:

I favor 100 percent the purpose of the proposed legislation. I introduced proposed legislation on this subject about 3 years ago. The purpose of it is to prevent bank holding com-

panies from expanding, except under controlled conditions. I think that is the best way to put it.

Senator Douglas stated at Page 6857:

> For here, as elsewhere, the control over credit is moving into fewer and fewer hands.
>
> At the same time, industry has been moving out of competition into closer and closer concentration—monopoly and quasi-monopoly. This has been helped by the big banks. If we do not wish to travel the path of Canada, Great Britain, and Germany, we should do something effective to check and, if possible, to roll back the concentration of banking and credit. For he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well.

Senator Bricker stated at Page 6861:

> Under the bill, a bank holding company must obtain prior approval from the Federal Reserve Board before it can acquire a bank. The Federal Reserve Board in considering an application for an acquisition must take into consideration five factors. These factors are, first, the financial history and condition of the company or companies in the banks concerned; second, their prospects; third, character of their management; fourth, convenience, needs, and welfare of the communities in the area concerned; and, fifth, whether or not the effect of such acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.
>
> The last factor I named is the most important and requires the Federal Reserve Board to consider the question of the public interest and the preservation of competition in the field of banking. This provision gives the Federal Reserve

Board power to prevent undue concentrations of banking activities and at the same time permits the strengthening and expansion of banking facilities when needed.

The foregoing excerpts, which are a few examples only and not an exhaustion of statements relating to the problem which the Bank Holding Company Act was designed to solve,[8] establish that the purpose of that legislation is in substantial part identical with that of § 7 of the Clayton Act. Despite this common purpose, the legislative history affords little enlightenment concerning Congressional intent as to the relationship of the two statutes or the effect of the Bank Holding Company Act upon § 7 of the Clayton Act and its enforcement provisions, § 11 and § 15.[9]

As some of the statements above quoted reveal, the existence of § 7 of the Clayton Act and its applicability to bank holding company acquisitions was, by some, virtually unrecognized.[10]

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[8] There is no reason in this discussion to cover other problems facing Congress, such as interests by bank holding companies in nonbanking companies, etc.

[9] In considering this question it is well to remember that in 1955 and 1956, when the Bank Holding Company Act was being considered, no action involving bank holding companies had been commenced under § 15 by the Department of Justice to enforce § 7, and only one proceeding, the *Transamerica* case, *supra*, had been commenced under § 11, which proceeding resulted in a determination that a violation of § 7 had not been proved. Also, the recent Supreme Court decisions regarding the scope of § 7 were of course not available.

[10] See also the statement of Governor Robertson at Page 112 of the House Committee Hearings:

"As was stated this morning, there are really two gaps in existing legislation. One is with respect to expansion. You have no control over it whatsoever. The other relates to combining of different businesses under the same roof. There is no control there. Those gaps should be covered and this legislation purports to do that."

Other statements reveal that some believed the Federal Reserve Board alone had jurisdiction to enforce §7. Thus, in an exhibit at Pages 27 and 28 of the House Committee Hearing, the following appears:

> That Congress intended to protect the American banking system against overconcentration and monopoly was made manifest when it passed the Clayton Act in 1914. In that act the Federal Reserve System was charged with responsibility for enforcing the prohibitions against stock acquisitions of banks whenever the effect might substantially lessen competition or tend to create a monopoly.

At Page 110, Representative Multer made this statement:

> Let me make this observation and then either you or Governor Robertson can pick it up from there: As I understand it, when the antitrust laws were written, the Congress took into account that banking was a very specialized part of our economy, and they have deliberately said that the Federal Reserve Board would have jurisdiction over all antitrust violations in the banking field. Isn't that so?

And at Page 315 of the Senate Subcommittee Hearings, J. Cameron Thomson, President of Northwest Bancorporation, said:

> No holding company objects to control of acquisitions of bank holding companies if the test is based on sound banking considerations and the antitrust provisions of the Clayton Act, which, so far as banks are concerned, is the responsibility of the Federal Reserve Board.

Still other statements recognize §7, but express dissatisfaction with the enforcement thereof. For

example, at the Senate Subcommittee Hearings, Representative Multer stated:

> You will remember that there was written into the law provisions giving jurisdiction to the Federal Reserve Board to review those matters and take action with reference to any possible attempts to create a trust or monopoly in the banking field. There has not been a single recommendation all through the years by the Federal Reserve Board to the Attorney General for prosecution in that field. There has not been a single attempt all through the years by the Federal Reserve Board to do anything or, for that matter, by the Comptroller of the Currency to attempt to restrain expansion of banks. Not a single application for permission to merge or consolidate has been disapproved by either of them. (Page 361)
>
> Yes. I am of the opinion that the Federal Reserve Board entirely overlooked their duties as imposed upon them by the Clayton Act through the years until the clamor arose against bank mergers and bank consolidations as they are happening in the present era. I think they entirely overlooked the fact that they had the right to say "There shall be no merger or no consolidation because of the provisions of the Clayton Act." Their entire tendency as indicated by their constant approvals, their failure to stand up and say, "No, this merger shan't go through, and that consolidation shan't go through," indicates a sympathy for the colossus, for the stupendous, in the banking industry. (Page 367)
>
> With reference to that specific matter, I think it is important to emphasize that with the strengthening of the antitrust laws so far as banks, bank stocks and bank acquisitions are concerned, and if our Federal agencies will now be alerted to their duty to step in and

make sure that there are no violations of the antitrust law—and the whole history of it up to date shows that there has been no attempt to look at this situation up to the present moment so far as banks are concerned with any view as to whether or not they will be monopolistic or in violation of the antitrust laws—the minute we strengthen those laws and the minute our enforcement agencies begin to look into this situation of bank-stock acquisition and bank-asset acquisition and begin to bring to bear the full force of the antitrust laws, then bank holding companies must become the device to evade the law unless we enact a bill such as this. They can accomplish the identical thing through the bank holding company that you are seeking to prevent by regulating bank acquisitions and bank-stock acquisitions. (Pages 368–369)

Others indicated that it was believed that §7 lacked effectiveness in the area of bank holding company acquisitions. Thus during the Senate Subcommittee Hearings, the following colloquy took place at Page 316:

Senator ROBERTSON. What is the largest bank holding company?

Mr. THOMSON. Transamerica is still the largest. Marine Midland second.

Senator ROBERTSON. The Federal Reserve Board accused them of violating the antitrust laws.

Mr. THOMSON. That is right.

Senator ROBERTSON. What was the outcome?

Mr. THOMSON. In layman's language, they did not prove their case. But it did prove they did not have the right to bring action under the antitrust laws.

Senator ROBERTSON. Then, Tom McCabe, Chairman of the Federal Reserve, proceeded against the biggest one?

Mr. THOMSON. That is correct.

Senator ROBERTSON. On the ground that it was violating the antitrust law? And did not prove the case?

Mr. THOMSON. That is my understanding.

Senator ROBERTSON. Then you would assume from that that at the present time there is no bank holding company that could be successfully prosecuted as violating the antitrust laws of the Nation?

Mr. THOMSON. Just as a layman, I would assume that, having started out on that course, if there are others, they would have brought action.

And during the House Committee Hearings, Harry J. Harding, President of the Independent Bankers Association of the 12th Federal Reserve District, said at Page 187:

> Now, on all sides we see the signs of holding-company acquisitions, and a striving for a bigger and bigger share of the country's bank deposits. Does this sound like inertia, or is it the beginning of another mad scramble for banks, the aftermath of the Court's decision in the Transamerica case that the tool the Federal Reserve Board had leaned on, the Clayton Act, was no tool at all with which to combat a tendency toward monopoly?

And during the House debates at age 8033 of Volume 101 of the Congressional Record, Representative Rhodes stated:

> I wonder if the committee has considered that banks are subject to the Sherman Act and they are subject to the Clayton Act. I know there are some loopholes which now exist in the Clayton Act which make it impossible at the present time to treat as fully as they should be treated the monopolistic tendencies, if any there are, in the banking business. But would not the better approach be to amend the Clayton Act and the

Sherman Act, so that this tendency toward monopoly, if it exists, could be handled in the ordinary subjective way by the Attorney General of the United States and the United States attorneys, instead of having the Congress say, "This is a situation which must by its very nature be monopolistic and, therefore, bad. We will make sure it does not happen any more?" I do not think that is the proper way to legislate on a subject such as this.

Another indication of Congressional intent regarding the relationship between the Bank Holding Company Act and the Clayton Act appears in Volume 102, Part 11 of the Congressional Record at Page 14346 when Senator Fulbright, discussing bank merger legislation considered the same year the Bank Holding Company Act was passed, by the same Congress, stated:

In this connection, it should be noted that there was an unsuccessful attempt to enforce the stock acquisition provisions of section 7 against a bank holding company. The enactment of the Bank Holding Company Act of 1956 earlier this year provides effective regulation of all acquisitions by bank holding companies, and thus eliminates the necessity of resorting to the Clayton Act in such cases.

And in Senate Report No. 2583, 84th Congress, 2nd Session (1956), on that merger legislation at Page 4, the following appears:

As was stated previously, the attempt to enforce the stock acquisition provisions of section 7 against the Transamerica Corp. was unsuccessful. The Bank Holding Company Act by requiring advance approval by the Federal Reserve Board of all acquisitions by bank holding companies eliminates the necessity of resorting to section 7 in such cases. Thus, section

7 of the Clayton Act is actually an insignificant factor in the control of acquisitions by either banks or bank holding companies.

Our conclusions after studying the legislative history are as follows:

1. When it enacted the Bank Holding Company Act of 1956, Congress believed that the Clayton Act could not effectively cope with concentration in banking or with the danger to competition among banks which might result from bank holding company acquisitions.

2. It was the intent of Congress in enacting holding company legislation to strengthen, or activate, not repeal, § 7 of the Clayton Act.[11] To attain this result,

[11] At Page 325 of the Senate Subcommittee Hearings, Mr. Thomson stated:

"There may be another and more simple method of dealing with this question. Expansion of bank holding companies is primarily a question of competition and monopoly. Acquisitions by bank holding companies are subject to the Sherman Act and, as recently decided in the Transamerica litigation, to the Clayton Act insofar as stock acquisitions are concerned.

"There are now pending in Congress S. 2075 introduced by Senator Sparkman and H.R. 5948 introduced by Mr. Celler which would complete the coverage by bringing asset acquisitions within section 7 of the Clayton Act. This problem might and perhaps should be dealt with directly as one of monopoly and competition. The indirect approach adopted by H.R. 6227 has resulted in a bill which will lead to confusion in the field of bank regulation, unnecessary conflict between State and Federal authorities, and *restrictions on normal growth far more severe than those of the antitrust laws.*" (Emphasis ours.)

And during the House Committee Hearings, R. M. Evans, former Governor of the Federal Reserve System, stated:

"During all the years that the Board was working with bank holding company legislation, and all the years they were working with bank holding companies, we always had it in our minds that in the Clayton Antitrust Act we had some powers that could compel these people to observe the rules and regulations of the administrative body. It was only after we tried the

Congress chose to prohibit completely acquisitions by bank holding companies of a certain percentage of the voting shares of any bank unless prior approval

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case and submitted it to the courts, and the courts turned it down, that the question became really urgent, because as of today there is no regulation available, no regulating power available to the Board of Governors to stop the increase in bank holding company acquisitions of independent banks.

"Just to give you one little paragraph from the bank holding company hearings on S. 76 and S. 1118, we quote from the court's decision:

"'We agree that this quantitative analysis'—that is simply a statistical analysis to show the immense concentration of power in this Transamerica Corp.—'we agree that this quantitative analysis discloses a tremendous concentration of banking capital and thereby of economic power in the hands of the Transamerica group, which may be unwise and against sound public policy. It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide. Our only question is whether the theory upon which the Board based its decision meets the legal tests which are required under section 7 of the Clayton Act, to determine whether Transamerica's bank stock acquisitions tend to create a monopoly of commercial banking. We are compelled to agree with Transamerica that they do not.'

"So the court told the banking industry, and they told the Congress, that the Clayton Antitrust Act, under which these hearings were held, is not an adequate tool to accomplish the result that I have an idea Congress intended it should take care of in the basic legislation." (Page 507)

* * * * * * *

"The worst part about the whole hearing was that when this law came up for a test in court it was found to be inadequate to do the job it was supposed to do. That is the great tragedy of the whole Transamerica hearing." (Page 508)

And the following colloquy took place (Pages 509–510):

"The CHAIRMAN. You think the Clayton Antitrust Act is entirely inadequate to meet the situation, don't you?

"Mr. EVANS. There is no longer the slightest question in my mind, Mr. Chairman. I was the hearing officer. I recommended

was obtained from the Board of Governors of the Federal Reserve System, which Board was charged with the duty of enforcement of § 7 of the Clayton Act.[12]

It instructed the Board to consider five factors in determining whether approval should be granted, each factor being a significant consideration in a § 7 case,[13] and, in order that all relevant competitive factors not specifically set forth could be considered, directed the Board in general terms to consider whether the effect of the acquisition would be to expand the bank holding company system involved beyond limits consistent with the preservation of competition in the field of banking.

3. Congress intended that the Board, while ruling on acquisitions subject to the Bank Holding Company Act, simultaneously perform its duties under the Clayton Act and that the Board alone retain Clayton Act jurisdiction with respect to acquisitions subject to the Bank Holding Company Act.

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the divestment of this whole thing. I thought the evidence was overwhelmingly that way and yet the court said that we did not have the authority to make our position stick. So the thing is inadequate and ineffective.

"The CHAIRMAN. And if there is any regulation of holding companies, it ought to be written into the banking law which directly affects these institutions and governs their activity.

"Mr. EVANS. Absolutely. I think it is basically wrong to permit any group of people to evade the law."

[12] In this way, Congress could insure examination by an enforcement agency of the competitive effect of each acquisition. Until passage of the Bank Holding Company Act, despite the existence of the Clayton Act with its dual enforcement provisions, no such examination inevitably occurred. As stated previously, no action and only one proceeding involving bank holding companies had been commenced charging violation of §7 of the Clayton Act.

[13] See footnote 5, *supra*.

We realize that this conclusion in effect repeals § 15 of the Clayton Act. We also realize, as stated in *Philadelphia Bank*, at Pages 350-351, that

> Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.

We wish to emphasize, therefore, that no repeal of the substantive provisions of § 7 is here intended and that in our opinion the Bank Holding Company Act effected a change only in the manner in which § 7 was to be enforced.[*] A holding that § 15 is repealed as to acquisitions subject to the Bank Holding Company Act is, in our opinion, compelled by the existence of plain repugnancies between the two provisions.

In urging that determinations by the Board on the propriety of acquisitions under the Bank Holding Company Act are distinct from or do not involve § 7 determinations, the plaintiff in effect asks us to rule

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[*] As footnote 22 on Pages 344 and 345 of the *Philadelphia Bank* case reveals, repeal by implication of enforcement provisions of the antitrust laws is not unique. The Supreme Court there stated:

"Section 11 of the Clayton Act, 15 U.S.C. § 21, vests the FRB with authority to enforce § 7 'where applicable to banks.' This provision has been in the Act since it was first passed in 1914 and was not changed by the 1950 amendments. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we think, whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under § 11 as it existed before the 1950 amendment of § 7 remains unaffected."

that the Board, after performing its duty under the Bank Holding Company Act, considering the factors therein specified, and finding that an acquisition should be approved, has, in circumstances such as the plaintiff claims exist in the instant case, a duty under § 11 of the Clayton Act to challenge that same acquisition on the grounds that it is violative of § 7. Any construction of the statutes which would place the Board in that self-contradictory role would, in our opinion, be absurd.[18] Rather, we believe that Congress intended that when performing its function under the Bank Holding Company Act, the Board should simultaneously exercise its authority to enforce § 7, preventing before they occur acquisitions which would violate that section, and that the Board alone should have such enforcement powers.[19]

The nature of proceedings before the Board with respect to bank holding company acquisitions and of the review of Board orders provided by the Bank Holding Company Act also compels the conclusion that action taken by the Board with respect to a bank holding company acquisition and appellate review thereof was intended by Congress to be a final determination of the legality of that acquisition in all respects.

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[18] It might be argued, to remove this absurdity, that the Bank Holding Company Act repealed the Board's authority to enforce the Clayton Act by implication rather than repealing § 15. We believe it would be equally absurd to hold that Congress in directing the Board to examine proposed acquisitions in the light of the factors specified in the Bank Holding Company Act, intended to divest it of the authority and duty to enforce § 7.

[19] In other words Congress abandoned the theretofore ineffective system of dual enforcement as to acquisitions covered by the Bank Holding Company Act in favor of required examination and enforcement by the Board prior to the acquisitions.

Admittedly, the hearing provisions of § 3 of the Act, quoted previously, are somewhat sparse. No hearing need be held if the Comptroller of Currency or State banking authority does not disapprove the application.[17] However, that such provisions are adequate to enable the Board to resolve the issues involved and make its determination is demonstrated by the following statement by the United States Supreme Court in the *Whitney Bank* case, at Page 417:

> Provision is made (under the Bank Holding Company Act) for a full administrative proceeding before the Board in which all interested persons may participate and the views of the interested supervisory authorities may be obtained.

See also, as to adequacy of Board proceedings, *Northwest Bancorporation* v. *Board of Governors, etc.*, (C.A. 8, 1962) 303 F. 2d 832; *First Wisconsin Bankshares Corp.* v. *Board of Governors* (C.A. 7, 1963) 325 F. 2d 946. And the plaintiff here has never pointed to any position it could not have enlarged and presented adequately before the Board.[18]

Likewise the plaintiff has never claimed that it did not have the right to seek review of the Board's

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[17] As a matter of practice, however, it appears that the Board does hold hearings even though no disapproval by the Comptroller or state banking authority is filed. See *Whitney Bank* v. *New Orleans Bank* (1964) 379 U.S. 411, at Page 416.

[18] In this case the plaintiff deliberately chose not to attack the defendant holding company's acquisition of stock of Marshall & Ilsley Bank and Northern. When the holding company sought approval of acquisition of the stock of Commerce, the Department of Justice filed statements with the Board opposing the acquisition, and in a petition for reconsideration urged its position that the acquisition violated § 7 of the Clayton Act. The state banking authorities had recommended that the Board approve the acquisitions

orders under § 9 of the Bank Holding Company Act and clearly, where plaintiff's contentions are rejected by the Board, it must be considered a "party aggrieved" within the meaning of that section. Had it sought review, which it did not, the plaintiff would have had the burden of convincing the Court of Appeals that the Board's findings were not supported by substantial evidence or that its conclusions therefrom were erroneous. We find it repugnant to hold that Congress contemplated that the plaintiff could ignore this right of review completely, when its § 7 contentions unsuccessfully raised before the Board can be presented to the Court of Appeals, and commence an action in the district court. Particularly is this true since Congress rejected provisions permitting trial *de novo* in the Bank Holding Company Act in favor of the far more limited court review permitted under § 9.

In the Court's opinion, the jurisdictional question here presented has been decided by the Supreme Court in the *Whitney Bank* case. In that case, the Supreme Court held that the district court had no jurisdiction to pass on the merits of a holding company proposal, and that original exclusive jurisdiction with respect thereto rested in the Federal Reserve Board. It stated:

> We believe Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested. *Admittedly the acquisition of an existing bank is exclusively within the jurisdiction of the Board.* (Page 419) (Emphasis ours.)

* * * *

> . . . it is the exclusive function of the Board to act in such cases and contests must be pursued before it, not before the Comptroller. This position is also supported by legislative history which shows that Congress rejected a proposal for a *de novo* review in the district courts of Board decisions on holding company proposals. Compare 12 U.S.C. § 1848 (1958 ed.) and S. Rep. No. 1095, pt. 1, 84th Cong., 1st Sess., 9 and pt. 2, 84th Cong., 2d Sess., 5, with § 9 of H.R. 6227, 101 Cong. Rec. 8187, and H.R. Rep. No. 609, 84th Cong., 1st Sess., 22, 25-26. Such a procedure would have been similar to that employed here against the Comptroller by respondents. However, the Congress decided otherwise, providing instead for review in the courts of appeals based on the facts found by the Board supported by substantial evidence. We think these congressional actions point clearly to the conclusion that it intended that *challenges to Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in the statute.* (Emphasis ours.)
>
> This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, these procedures are to be exclusive. See, *e.g., Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To

permit a district court to make the initial determination of a plea's propriety would substantially decrease the effectiveness of the statutory design. (Pages 419-420)

* * * * *

Moreover, we reject the notion that the Board's determination may be collaterally attacked in the District Court by a suit against the Comptroller. Opponents of the opening of a new bank by a bank holding company must first attack the arrangement before the Board, subject only to review by the Courts of Appeals. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *United States* v. *Corrick*, 298 U.S. 435 (1936). That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts. Moreover, it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

A rejection of this doctrine here would result in unnecessary duplication and conflicting litigation. Some opponents might participate before the Board; others might well wait for termination of the Board's activities and then sue in the district courts for an injunction accomplishing the same ultimate end. The different records, applications of different standards and conflicting determinations that would surely result from such duplicative procedures all militate in favor of the conclusion that the statutory steps provided in the Act are exclusive. (Pages 421–422)

* * * * *

> We have discussed earlier the importance which Congress has attached in the Bank Holding Company Act of 1956 to the principle that the Federal Reserve Board, with its expertise in the banking field, should make the initial determination of the propriety of the plan of organization, giving full consideration to the legislative guidelines set out in the Act. (Page 424)

In a brief filed April 1, 1966, the plaintiff belittles the defendants for their reliance on the *Whitney Bank* case as follows:

> The repeated citation to the Court by defense counsel in current and previous correspondence of the statement in *Whitney National Bank v. Bank of New Orleans & Trust Co., et al.*, 379 U.S. 411, 414, to the effect that the Federal Reserve Board has "original exclusive jurisdiction" under the Bank Holding Company Act is peculiarly misplaced, and demonstrates manifest misunderstanding of the doctrine of "primary jurisdiction." In the first place, use of the statement in the *Whitney* case must be read in light of the fact that the particular litigation was not an antitrust one and involved no proceeding under any antitrust statutes. (Page 5)

And in a brief filed May 9, 1966, it attempts to distinguish that case and states:

> What the whole *Whitney Bank* dispute was really about, therefore, was the question of alleged illegality of the *de novo* bank under state anti-branch banking laws. It was not concerned with antitrust in general, Section 11 in particular, or with any question of Section 9 versus Section 11. The various statements in the Supreme Court's decision, whether they be about primary jurisdiction, exhaustion of ad-

ministrative remedies, appellate review or the like, must be regarded in light of this fundamental fact. (Pages 7-8)

The plaintiff's attempts to distinguish the *Whitney Bank* case are without merit. Contrary to plaintiff's statement, that case did not in our opinion involve any application of the doctrine of primary jurisdiction and defendants have demonstrated no misunderstanding of that doctrine. Rather, it dealt with the exclusive jurisdiction of the Board. We find nothing in the decision indicating that the fact that a new bank rather than an existing bank was being acquired was significant, particularly since the Court stated clearly that acquisition of an existing bank was exclusively within the Board's jurisdiction.

Neither do we consider the fact that the *Whitney Bank* case was not an antitrust action a relevant distinction. It is true that the savings clause of the Bank Holding Company Act, § 11, quoted previously, states that nothing contained in the Act shall constitute a defense in any suit arising out of any prohibited antitrust or monopolistic act, action or conduct. It also provides, however, that nothing contained in the Act shall be interpreted as approving any act, action or conduct in violation of existing law. Despite this latter mentioned provision of the savings clause, the Supreme Court held that the Board had exclusive jurisdiction to determine the legality of an acquisition which the Court of Appeals had held to be in violation of the Banking Act of 1933. We see no reason for giving the savings clause a greater effect when an antitrust violation is claimed than when violation of other existing law is alleged.

The savings clause upon which the plaintiff relies did not appear in bank holding company legislation as originally introduced in the House and Senate and

there is little in the legislative history regarding its significance. In our view this section does not as the plaintiff claims reserve to it the right to challenge in a separate action acquisitions approved by the Board solely on the ground that the acquisitions violate § 7, and neither the Senate nor House Reports support that view.[19] This provision is entirely consistent with our view that the Federal Reserve Board must consider § 7 in making its determination on applications under the Bank Holding Company Act and that the Board alone, subject to review, can enforce that section with respect to acquisitions subject to that Act.

The plaintiff had an opportunity to present its § 7 contentions before the Board when the acquisitions

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[19] With respect to that section, House Report No. 609 states at Page 24:

"Section 8. This section contains a savings clause to make clear that nothing in this act shall be construed as approving any act, action, or conduct in violation of existing law or constituting a defense in antitrust or monopolistic proceedings."

and Senate Report No. 1095 states at Page 19:

"The bill provides that none of its provisions are to be construed as approving any act, action or conduct in violation of existing law. It also provides that nothing in the bill shall constitute a defense to any action, suit, or proceeding pending or later instituted on account of any prohibited antitrust or monopolistic act, action or conduct. In the opinion of your committee, approvals granted and action permitted under the provisions of this bill are not to supersede the provisions of other Federal laws, particularly those designed to control monopoly or bank up trusts. For example, the Clayton Act has been judicially determined to apply to banks. Under the provisions of that act, the Federal Reserve Board has an administrative role to play in determining whether banks comply with the requirements of the Clayton Act. Under the provisions of this bill, any action taken by the Federal Reserve Board in accordance with its terms is not to interfere in any manner with the performance by the Board of such functions as may be assigned to it under the Clayton Act."

here involved were under consideration. It failed to object to the defendant holding company's acquisition of stock of Marshall & Ilsley Bank and Northern. When it chose to oppose the later acquisition of the stock of Commerce its position was considered by the Board and it was permitted to advance for consideration whatever material it desired. While it may be true that § 7 was not extensively discussed by the Board, the plaintiff's grievances in regard to its application should properly have been expressed to the Court of Appeals pursuant to § 9 of the Bank Holding Company Act and, for reasons heretofore stated, cannot be indirectly presented to this court.

In their answer the defendants challenged the jurisdiction of the court under § 15 of the Clayton Act. No jurisdictional defense was pressed, however, until after the trial had been completed. Since it must hold that it is without jurisdiction, the court believes a discussion of the merits would be improper. This is especially true since the Board having jurisdiction has rendered its decision.

Dated, Milwaukee, Wisconsin, this 15th day of June, 1966.

ROBERT E. TEHAN,
U.S. District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 61-C-54

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK AND THE BANK OF COMMERCE, DEFENDANTS

ORDER

For the reasons stated in the court's opinion of this date,

IT IS ORDERED: That the above action be and it is hereby dismissed.

Dated, Milwaukee, Wisconsin, this 15th day of June, 1966.

ROBERT E. TEHAN,
U.S. District Judge.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 61-C-54

UNITED STATES OF AMERICA, PLAINTIFF,

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK AND THE BANK OF COMMERCE, DEFENDANTS

OPINION

On June 15, 1966, this court rendered its opinion in the above case holding that it was without jurisdiction under § 15 of the Clayton Act to enjoin or undo as violative of § 7 of that Act stock acquisitions by a bank holding company which acquisitions must be or had been approved by the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956.[1] Pursuant to that opinion, an order was entered that same day dismissing the action. On August 12, 1966, the plaintiff filed its notice of appeal.

On July 1, 1966, after the action was dismissed but before the appeal was taken, the Bank Holding Company Act of 1956 was amended. On September 23, 1966, the plaintiff filed a motion in this court asking the court to reconsider and vacate its judgment of

[1] This opinion is reported in 255 F. Supp. 273.

June 15, 1966. Briefs with respect thereto have been filed and oral argument has been waived. Despite the fact that an appeal is pending, it appears that this court has jurisdiction to consider the motion at least to the extent of indicating its probable ruling thereon.[2]

The plaintiff contends that the recent changes in the Bank Holding Company Act cast light on the jurisdictional problems heretofore considered by this court and make it clear that Congress, in passing the Bank Holding Company Act of 1966, did not intend to remove from the United States, through the Antitrust Division, the right to challenge as violative of § 7 of the Clayton Act acquisitions such as those involved herein in suits brought pursuant to § 15 of the Clayton Act.[3] It asks the court to vacate its judgment of dismissal and proceed to a determination of the merits.[4]

We have examined with care the material submitted by the plaintiff in support of its motion, that is, the legislative history of Public Law 89-485 on which the plaintiff relies and the law itself, and find therein nothing which sheds light on the matters considered in our previous opinion. Congress amended the Bank Holding Company Act to apply to bank hold-

[1] See *Bitco Manufacturing Company* v. *Ransburg Electro-Coating Corporation*, 7 Cir. 1960, 281 F. 2d 252; 7 Moore's Federal Practice, 2d Ed. 60.30 [2].

[2] The plaintiff has not contended that the recent amendments confer jurisdiction but argues that they confirm the fact that jurisdiction existed prior to their enactment.

[3] The plaintiff apparently asks the court to consider the facts set forth in amended subsection b of § 7 of the Bank Holding Company Act pursuant to new subsection c of § 11. The recent decision in *United States* v. *Crocker-Anglo National Bank, et al.* N. Dist. Calif. S. Div. October 6, 1966, casts doubt on the court's authority to so proceed even if it agreed with the plaintiff that it had jurisdiction over the action.

ing company acquisitions the procedures and standards applicable under the Bank Merger Act as amended on February 21, 1966 by Public Law 89-356. In so doing, it made no statement or determination as to the jurisdiction of United States district courts under § 15 of the Clayton Act to enforce § 7 of that Act as to approved bank holding company acquisitions between the time of passage of the Bank Holding Company Act and the time of passage of the amendments. The legislative history reveals no analysis of possible jurisdictional differences under the Bank Holding Company Act and the Bank Merger Act and contains no reference to Congressional intent regarding jurisdiction when the Bank Holding Company Act of 1956 was enacted. While it might be argued that Congress assumed in 1966 that jurisdiction under the Bank Holding Company Act was identical to jurisdiction under the Bank Merger Act prior to its amendment, this argument, without analysis, discussion or support in the legislative material submitted, does not convince us that reconsideration and reversal of our previous decision is warranted. Neither does the fact that new § 11(e) refers to pending litigation initiated under the antitrust laws by the Attorney General, or the fact that new § 11(b) limits the time in which antitrust actions may be brought and sets the standards applicable in such actions. We must therefore indicate that if this case were remanded, the plaintiff's motion to reconsider and vacate the judgment of June 15, 1966 would be denied.

Dated, Milwaukee, Wisconsin, this 17th day of November, 1966.

ROBERT E. TEHAN,
U.S. District Judge.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

(Civil Action 61-C-54, Filed March 2, 1961—Equitable Relief Sought)

UNITED STATES OF AMERICA, PLAINTIFF

v.

BANK STOCK CORPORATION OF MILWAUKEE, MARSHALL & ILSLEY BANK, NORTHERN BANK, AND THE BANK OF COMMERCE, DEFENDANTS

COMPLAINT

The United States of America, plaintiff, by its attorney, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the above-named defendants under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125, 15 U.S.C. 18, in order to prevent and restrain continued violations by the defendants, as hereinafter alleged, of Section 7 of said Act.

2. Each of the defendants maintains offices, transacts business, and is found within the Eastern District of Wisconsin and within the jurisdiction of this Court.

II. THE DEFENDANTS

3. Bank Stock Corporation of Milwaukee, hereinafter sometimes referred to as "Bank Stock Corporation," is made a defendant herein. It is a corporation organized under the laws of the State of Wisconsin, and has its principal place of business at 721 North Water Street, Milwaukee, Wisconsin.

4. Marshall & Ilsley Bank, hereinafter sometimes referred to as "Marshall & Ilsley," is made a defendant herein. It is a corporation organized under the laws of the State of Wisconsin, and has its principal place of business at 721 North Water Street, Milwaukee, Wisconsin.

5. Northern Bank, hereinafter sometimes referred to as "Northern," is made a defendant herein. It is a corporation organized under the laws of the State of Wisconsin, and has its principal place of business at 3536 West Fond du Lac Avenue, Milwaukee, Wisconsin.

6. The Bank of Commerce, hereinafter sometimes referred to as "Commerce," is made a defendant herein. It is a corporation organized under the laws of the State of Wisconsin, and has its principal place of business at 745 North 4th Street, Milwaukee, Wisconsin.

III. TRADE AND COMMERCE

7. The business of commercial banking is an essential part of the nation's economy. Commercial banks (hereinafter sometimes referred to merely as "banks") engage in, among other things, dealing in

money, securities and negotiable instruments; accepting time and demand deposits from individuals, partnerships, corporations, and governmental agencies; and making loans for commercial and industrial, farm, real estate, and other purposes. Many commercial banks maintain safe deposit facilities, operate fiduciary departments, and engage in installment lending and accounts receivable financing. Commercial banks are located in and transact business in every State in the Union. Their facilities and services are utilized by the federal, state and local governments, by business and non-profit organizations, by corporations and individuals. The defendant commercial banks engage in some or all of the above-mentioned activities.

8. Marshall & Ilsley and Northern are members of the Federal Reserve System and are insured by the Federal Deposit Insurance Corporation. Commerce is insured by the Federal Deposit Insurance Corporation. All of the defendant banks are members of a clearing house association which transmits paper and settles balances across state lines. Defendant banks regularly use interstate mails, and telephone and telegraph services in the conduct of their business. They make loans across state lines, accept deposits from outside Wisconsin, and have correspondent relationships with banks outside Wisconsin. They are engaged in interstate commerce.

9. Concentration of control now marks the commercial banking business in the City and County of Milwaukee. As of June 1969, the four largest banks (out of a total of nineteen) accounted for approximately 80% of the total bank assets, deposits, and loans and discounts in the City of Milwaukee. They also accounted for 71% of the assets and deposits,

and 72% of the loans and discounts in the County of Milwaukee. These four banks and three others in the City of Milwaukee are under the control of three holding companies: defendant Bank Stock Corporation, Wisconsin Bankshares Corporation, and The Marine Corporation. If defendant Bank Stock Corporation retains control of Commerce, and if the pending application of The Marine Corporation to acquire control of Wisconsin State Bank is approved by the Board of Governors of the Federal Reserve System and is executed, the three holding companies will control eight banks in the City of Milwaukee out of a total of nineteen, and twelve banks in the County of Milwaukee out of a total of thirty-two. Present and proposed holding company affiliates in Milwaukee County are as follows:

Bank	City	Holding company	Status of [illegible]
1. First Wisconsin National Bank	Milwaukee	Wisconsin Bankshares	Affiliate.
2. [illegible] National Bank	Milwaukee	Wisconsin Bankshares	Affiliate.
3. Mayfair National Bank	Wauwatosa	Wisconsin Bankshares	New bank.
4. Marshall & Ilsley	Milwaukee	Bank Stock Corp.	Affiliate.
5. Northern	Milwaukee	Bank Stock Corp.	Affiliate.
6. [illegible]	Milwaukee	Bank Stock Corp.	Affiliate.
7. Marine National Exchange Bank	Milwaukee	The Marine Corp.	Affiliate.
8. Capitol Marine Bank	Milwaukee	The Marine Corp.	Affiliate.
9. Oakley Marine Bank	Oakley	The Marine Corp.	Affiliate.
10. [illegible]	[illegible]	The Marine Corp.	Affiliate.
11. Oak Creek Marine National Bank	Oak Creek	The Marine Corp.	New bank being organized.
12. Wisconsin State Bank of Milwaukee	Milwaukee	The Marine Corp.	Affiliate.

10. Concentration of control has increased markedly within approximately the last two years. During this period, the formation of Bank Stock Corporation and The Marine Corporation as bank holding companies (Wisconsin Bankshares Corporation was formerly the only bank holding company in Milwaukee County) has brought seven formerly independent banks in Mil-

waukee County and five in the City of Milwaukee (not including Wisconsin State Bank) under holding company control through stock acquisitions. If Wisconsin State Bank is included, the holding companies will have acquired, by stock acquisitions, eight formerly independent banks in the County and six in the City of Milwaukee with approximately 37% of the deposits of all banks in the City of Milwaukee and about 34% of Milwaukee County bank deposits. In addition, Wisconsin Bankshares has organized a new bank in Wauwatosa, Mayfair National Bank, and The Marine Corporation is organizing a new bank in the City of Oak Creek, Oak Creek Marine National Bank.

11. Marshall & Ilsley is the second largest bank in Milwaukee. More than 80% of the outstanding voting stock of Marshall & Ilsley was acquired by Bank Stock Corporation on or about December 2, 1959. Marshall & Ilsley conducts a general banking business, and has its head office and one branch in the City of Milwaukee. As of June, 1959, it had assets of $257,833,583, deposits of $231,353,926, and loans and discounts of $120,235,142.

12. Northern Bank is the fourth largest bank in Milwaukee. More than 80% of the outstanding voting stock of Northern was acquired by Bank Stock Corporation on or about December 2, 1959. It conducts a general banking service although, at least until acquisition by Bank Stock Corporation, it had no foreign service department, no trust department and no investment counseling department. As of June, 1959, it had assets of $54,587,683, deposits of $50,857,309, and loans and discounts of $19,697,132.

13. The Bank of Commerce conducts a general banking business on a smaller scale than Marshall &

Ilsley and Northern. As of June, 1959, the banks had deposits of $19,347,482, deposits of $17,579,189, and loans and discounts of $10,794,211. Some time about April 1959 over 78% of the outstanding stock of The Bank of Commerce was acquired by A. S. Puelicher, President and director of Bank Stock Corporation, and Chairman of the Board of Directors of Northern Bank. On January 25, 1961, the Board of Governors of the Federal Reserve System granted the application of Bank Stock Corporation for approval of the acquisition of 80% or more of the outstanding common stock of Commerce. The acquisition was consummated on or about January 26, 1961.

14. Prior to their acquisition as set forth above, Marshall & Ilsley, Northern, and Commerce competed with each other and with other banks in the City and County of Milwaukee, for, among other things, time and demand deposits, commercial and industrial, mortgage, real estate, and other types of loan business, and safe deposit customers.

15. As of June, 1959, Marshall & Ilsley accounted for about 17.39% of City of Milwaukee bank assets, 17.27% of deposits, and 18.45% of loans and discounts. Northern accounted for 3.68% of total assets, 3.79% of deposits, and 3.02% of loans and discounts. Commerce accounted for 1.31% of assets, 1.33% of deposits, and 1.66% of loans and discounts. On a city basis, therefore, the acquisitions of these three banks gave Bank Stock Corporation control of banks with 22.38% of total assets, 22.39% of deposits, and 23.13% of loans and discounts; this constitutes an increase of 4.99% in assets, 5.12% in deposits, and 4.68% in loans and discounts, over the percentages held by Marshall

& Exley, the largest affiliate. For the County of Milwaukee, the comparable figures are:

Bank	Assets	Deposits	Loans and [illegible]
[illegible] & Exley	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
Bank of C[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

IV. OFFENSES CHARGED

16. The cumulative effect of the series of acquisitions described and set forth in paragraphs 11, 12 and 13 above, may be substantially to lessen competition or to tend to create a monopoly in commercial banking in the City and County of Milwaukee in violation of Section 7 of the Clayton Act, in the following ways, among others:

(a) Actual and potential competition among defendant banks has been eliminated.

(b) Actual and potential competition in commercial banking in the City and County of Milwaukee may be substantially lessened and the tendency to monopoly may be increased.

(c) Concentration in commercial banking in the City and County of Milwaukee has been substantially increased, and further concentration will likely be induced.

(d) The competitive advantage of defendants to [illegible] smaller banks may be enhanced to the detriment of actual and potential competition.

17. The effects of the violation alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

PRAYER

WHEREFORE, Plaintiff prays:

1. That Bank Stock Corporation of Milwaukee be adjudged to have violated Section 7 of the Clayton Act.

2. That, under such terms and conditions as the Court may prescribe, defendant Bank Stock Corporation of Milwaukee be required to divest itself of the stock unlawfully acquired.

3. The defendant Bank Stock Corporation of Milwaukee, its officers, directors, agents, employees, and all other persons acting on its behalf, be enjoined from acquiring any stock in any other commercial bank in the County of Milwaukee without the approval of this Court for such period of time as may be determined by the Court.

4. That plaintiff have such other and further relief as the Court may deem just and proper.

5. That plaintiff recover the cost of this suit.

(S) Robert F. Kennedy,
ROBERT F. KENNEDY,
Attorney General.

(S) Daniel R. Ohlbaum,
DANIEL R. OHLBAUM,
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(S) George D. Reycraft,
GEORGE D. REYCRAFT,
Attorney, Department of Justice.

(S) Edward G. Minor,
EDWARD G. MINOR,
United States District Attorney,
Eastern District of Wisconsin.

APPENDIX E

1. The Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 12, *et seq.*, provides in pertinent part:

Section 7, 15 U.S.C. 18:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 15, 15 U.S.C. 25:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

2. The Bank Holding Company Act of 1956, 70 stat. 133, 12 U.S.C. 1841 *et seq.*, provides in pertinent part:

Section 3(c), 12 U.S.C. 1842(c):

> In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management;

(4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

Section 9, 12 U.S.C. 1848:

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

Section 11, 12 U.S.C. 1841 (note):

Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct.

3, P.L. 89-485, 80 Stat. 236, to amend the Bank Holding Company Act of 1956, provides in pertinent part:

Section 7(c).

Subsection (c) of section 3 of the Bank Holding Company Act of 1956 is amended to read as follows:

"(c) The Board shall not approve—

"(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of [*sic*] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served."

Section 11:

Section 11 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 (note)) is amended by inserting "(a)" after "SEC. 11.", by inserting a comma and "except as specifically provided in this section" before the period at the

end thereof; and by adding at the end thereof the following new subsections:

"(b) The Board shall immediately notify the Attorney General of any approval by it pursuant to this Act of a proposed acquisition, merger, or consolidation transaction, and such transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction shall be commenced within such thirty day period. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented. In any judicial proceeding attacking any acquisition, merger, or consolidation transaction approved pursuant to this Act on the ground that such transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the Board is directed to apply under section 3 of this Act. Upon the consummation of an acquisition, merger, or consolidation transaction in compliance with this Act and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this Act shall exempt any bank holding company involved in such a transaction from complying

with the antitrust laws after the consummation of such transaction.

"(c) In any action brought under the antitrust laws arising out of any acquisition, merger, or consolidation transaction approved by the Board pursuant to this Act, the Board and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(d) Any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this amendment, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

"(e) Any court having pending before it on or after the date of enactment of this amendment any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act shall apply the substantive rule of law set forth in section 3 of this Act."

U.S. GOVERNMENT PRINTING OFFICE: 1957

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FILED
APR 26 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1017

UNITED STATES OF AMERICA,

Appellant,

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK and the BANK OF COMMERCE,

Appellees.

APPELLEES' RESPONSE FILED AT REQUEST OF THE COURT

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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Appellees.

APPELLEES' RESPONSE FILED AT REQUEST OF THE COURT

This Court by its Clerk requested us to file in the above entitled appeal a response to this Court's decision on March 27, 1967 in Case Nos. 914 and 972, October term 1966*. Therein this Court resolved certain procedural questions arising in antitrust cases from the language in the Bank Merger Act of 1966 (bank merger act decision). Similar language to that thus construed appears in the

*United States v. First City National Bank of Houston, et al.
United States v. Provident National Bank, et al.

1966 amendment to the Bank Holding Company Act of 1956. However, said 1966 Bank Holding Company Act amendment did not become effective until July 1, 1966, i.e., after the entry on June 15, 1966 of the judgment of dismissal, review of which is sought by this appeal.

The issue in this case is well stated by the Government in its Notice of Appeal as follows:

> "The question persented by this appeal is:
>
> Whether the Bank Holding Company Act, *previous to its amendment in 1966,* deprived the district courts of jurisdiction over suits by the United States under Section 15 of the Clayton Act challenging under Section 7 thereof bank holding company acquisitions approved by the Federal Reserve Board?" (Italics supplied)

A brief history of the jurisdiction of the United States District Courts in respect to enforcement of Section 7 of the Clayton Act (1) as to bank mergers and (2) as to bank stock acquisitions is therefore in order.

As to Bank Mergers

This Court squarely held in 1963 (1) that Section 7 of the Clayton Act applied to bank *mergers,* (2) that jurisdiction to enforce said statute had been by Section 15 of the Clayton Act (15 USC 25) vested in the United States District Courts, and (3) that the enactment of the Bank Merger Act of 1960 had not divested said Courts of said jurisdiction. See *United States v. Philadelphia National Bank,* 374 U.S. 321, at pp. 323 and 350. In so holding this Court noted at page 351 the absence of any requirement that the Comptroller of the Currency conduct a hearing, and the absence of any statutory provision for judicial review of the decision of the Comptroller of the Currency.

The Bank Merger Act of 1966, effective February 21, 1966, explicitly confirmed said jurisdiction in the United States District Courts, albeit subject to a 30 day period of limitations, and a directive to the Courts to apply the substantive rule of law specified therein by the Congress for initial application by the administrative agencies. 12 USC Sec. 1828(c)(7)(B). This Court, in its "bank merger act" decision of March 27, 1967, reviewed these new statutory provisions and declared the phrase "review *de novo*" relating to the jurisdiction of the District Courts under the Bank Merger Act of 1966 was equivalent to "trial *de novo*." (See slip opinion, pp. 6-7)

As to Bank Stock Acquisitions

Section 7 of the Clayton Act, even prior to its 1950 amendment, applied to outright bank stock acquisitions. *Transamerica Corp. v. Board of Governors of Federal Reserve System* (CA 3, 1953), 206 F. 2d 163; see also *United States v. Philadelphia National Bank* (1963), 375 U.S. 321, at p. 335. The jurisdiction to enforce Section 7 of the Clayton Act as to *bank stock acquisitions* was prior to 1956 vested by the Clayton Act concurrently (1) in the Federal Reserve Board by Section 11 (15 USC 21), and (2) in the United States District Courts by Section 15 (15 USC 25). It was this latter jurisdiction which the Trial Court held (see Government's Jurisdictional Statement, p. 2a) Congress intended to nullify by enacting the Bank Holding Company Act of 1956. In so doing it relied (J.S. p. 31a) upon this Court's construction of said Act in *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), where this Court explicitly held as to this issue at page 420:

> "This position is also supported by legislative history which shows that Congress rejected a proposal

for a *de novo* review in the district courts of Board decisions on holding company proposals. Compare 12 U.S.C. §1848 (1958 ed.) and S. Rep. No. 1095, pt. 1, 84th Cong., 1st Sess., 9 and pt. 2, 84th Cong., 2d Sess., 5, with §9 of H.R. 6227, 101 Cong. Rec. 8187, and H.R. Rep. No. 609, 84th Cong., 1st Sess., 22, 25-26. * * *"

This Court then declared at page 422:

"That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. *For Congress has expressly rejected proposed provisions for review in these cases in the district courts.* Moreover, it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and *requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.*" (Italics supplied) [The statutory provision for review of decisions of the Federal Reserve Board by a Court of Appeals appears in Section 9 of the Bank Holding Company Act of 1956 (12 USC 1848) set forth in the Government's Jurisdictional Statement at page 51a.]

As noted in our brief in support of the Motion to Dismiss or Affirm, the 1966 Bank Holding Company Act amendment repealed, but only as of July 1, 1966, the provisions of the Bank Holding Company Act of 1956, as construed by this Court in the *Whitney Bank* case. Congress in language similar to that employed in the Bank Merger Act of 1966 thereby revested in the United States District Courts the jurisdiction to enforce on and after July 1, 1966, Section 7 of the Clayton Act with respect to bank stock acquisitions.

Section 11(d) and (e) of the 1966 Bank Holding Company Act amendment read, however, as follows:

> "(d) Any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this amendment, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).
>
> "(e) Any court having pending before it on or after the date of enactment of this amendment any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition, merger, or consolidation of the kind described in section 3(a) of this Act shall apply the substantive rule of law set forth in section 3 of this Act."

On June 15, 1966, i.e., prior to the enactment of the 1966 Bank Holding Company Act amendment, the trial Court's final judgment of dismissal for lack of jurisdiction of the subject matter was duly entered. Therefore, only if this Court reverses the *Whitney Bank* construction of the Bank Holding Company Act of 1956, can the District Court acquire jurisdiction to enforce Section 7 of the Clayton Act in respect of Appellee's stock acquisitions. In that event the District Court would have to review the bank stock acquisitions involved on the basis of the substantive law standards promulgated by the Bank Holding Company Act amendment of 1966, even though said acquisitions were consummated in December, 1959 and January, 1961, respectively.

CONCLUSION

Manifestly, in view of the foregoing, the bank merger act decision of this Court filed March 27, 1967 which was carefully confined to bank mergers has not affected the basis asserted by Appellees for the granting of their Motion to Dismiss or Affirm. This conclusion is ineluctable because:

(1) the initial issue presented by the Government's appeal is whether it involves "litigation of 'great and general importance' where the government is the aggrieved party", the condition precedent to this Court's jurisdiction under the Expediting Act of February 11, 1903 (see *Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors and Publishers,* 375 U.S. 39 (1963) at page 40;

(2) even if deemed "pending" the Government concedes at page 13 of its Jurisdictional Statement that "this is the only pending antitrust suit attacking acquisitions by a bank holding company" and it was dismissed on June 15, 1966 for lack of jurisdiction prior to the effective date of the 1966 amendment to the Bank Holding Company Act of 1956;

(3) by the express provisions of Section 11(d) of the Bank Holding Company Act amendment of 1966 every other bank stock acquisition consummated prior to July 1, 1966, i.e., including the numerous acquisitions of Appellees' two bank holding company competitors during the period from 1958 to 1961 in which year this suit was started (see Complaint, Jurisdictional Statement, pp. 45a 46a) is now expressly "conclusively presumed not to have been in violation of * * *" Section 7 of the Clayton Act and

(4) any future bank stock acquisitions are not only subject to Section 7 of the Clayton Act but must be approved by Federal Reserve Board and are also reviewable *de novo* in the District Courts on suit by the United States.

This Court's bank merger act decision on March 27, 1967 in no wise militates against granting Appellees' Motion to Dismiss or Affirm.

Respectfully submitted,

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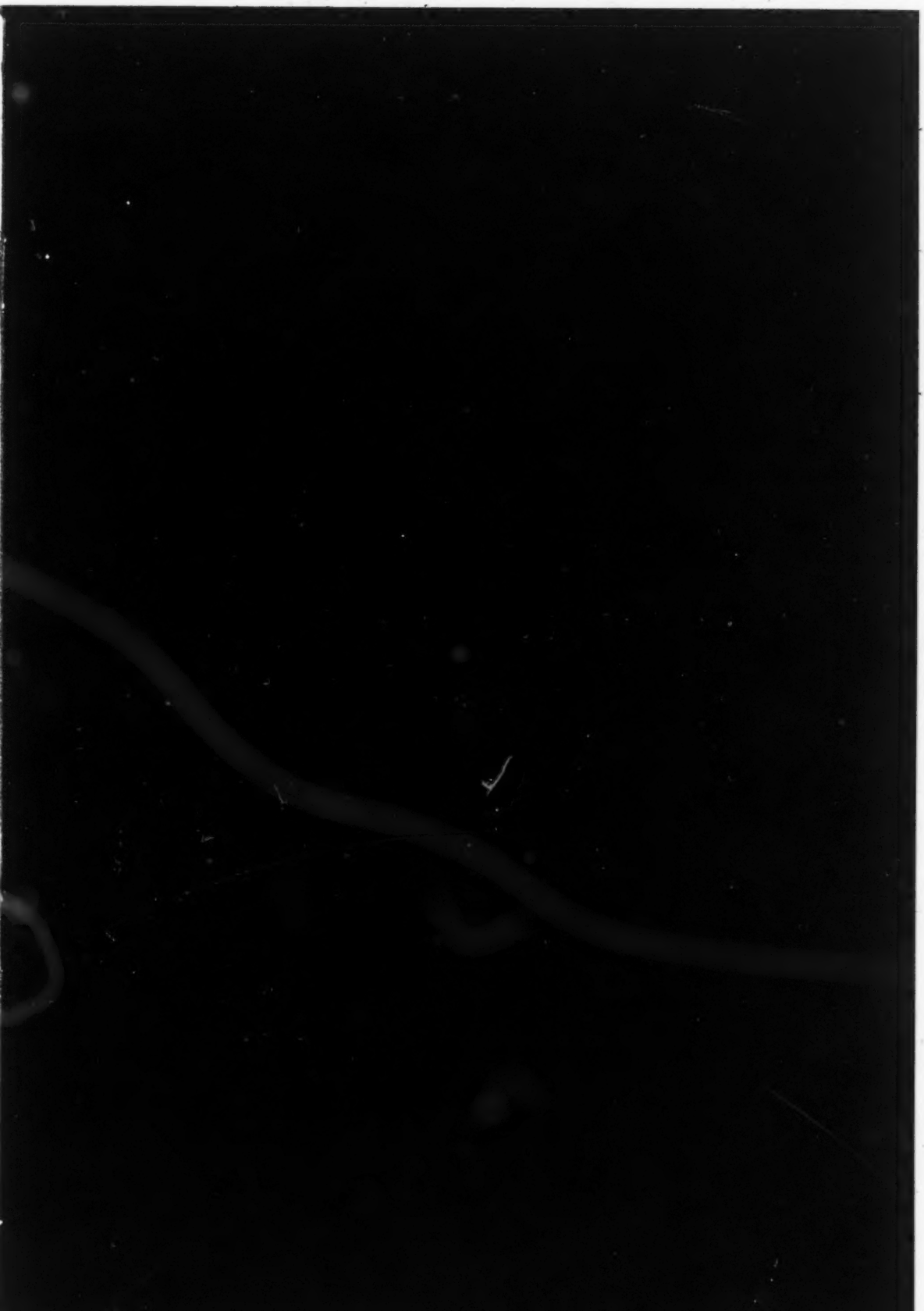

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 101

UNITED STATES OF AMERICA, APPELLANT

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK, AND THE BANK OF COMMERCE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On April 17, 1967, the Court invited the government to submit its views as to the bearing on the instant case of the Court's opinion, announced that day, in the *Houston Bank* case (*United States* v. *First City National Bank of Houston*, No. 914, this Term, and *United States* v. *Provident National Bank*, No. 972). As explained below, we believe the opinion confirms our view that the district court erred in dismissing the complaint in the present case for want of jurisdiction.

This case involves the acquisition of more than 80 percent of the voting stock of three banks in Milwaukee, Wisconsin, by a bank holding company.

361-343—67

Each acquisition was approved by the Federal Reserve Board under the Bank Holding Company Act of 1956, 12 U.S.C. 1841–1848. On March 2, 1961, the United States filed suit under Section 7 of the Clayton Act, 15 U.S.C. 18, seeking divestiture of the stock (J.S. App. 42a–49a). Following a lengthy trial on the merits, the district court dismissed the case, *sua sponte* (J.S. App. 38a; see J.S. 2a), on the ground that the jurisdiction of the district courts under Section 15 of the Clayton Act to enforce Section 7 against bank holding company acquisitions had been supplanted by the administrative remedies of the Bank Holding Company Act. In the court's view, the latter conferred exclusive jurisdiction on the Federal Reserve Board to approve bank holding company acquisitions, and hence such acquisitions could be questioned only by seeking review of the Board's decisions in the courts of appeals, pursuant to Section 9 of the Holding Company Act, 12 U.S.C. 1848 (J.S. 1a–37a).

The question presented in the jurisdictional statement is whether the Board's approval under that Act immunizes an acquisition from challenge by the United States in a suit under Section 7 of the Clayton Act. The *Houston Bank* opinion is relevant because there this Court reaffirmed the strong policy against implying antitrust immunity from a scheme of administrative regulation. At issue was the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C. 1828(c), which provides for initial submission of bank-merger proposals to the appropriate banking agency.[1] It was

[1] The Comptroller of the Currency, the Federal Reserve Board, or the Federal Deposit Insurance Corporation.

argued that the Act in effect repealed the Clayton Act as applied to bank mergers, so that (1) any action challenging a bank merger on the ground that it unlawfully lessened competition could be brought only under the Bank Merger Act of 1966, and (2) the district court in such an action was limited to deciding whether there was substantial evidence in support of the administrative agency's determination approving the merger. This Court rejected both contentions. It held that an action attacking a bank merger as anticompetitive should be brought under the antitrust laws, not the Bank Merger Act, and that the antitrust court must make its own independent determination of the legality of the merger, without according any presumptive weight to the initial administrative determination.

The reasoning underlying the *Houston Bank* decision reinforces the arguments set forth in our jurisdictional statement herein. The decision of the court below was bottomed on its belief that the Holding Company Act's provision for administrative approval of bank holding company acquisitions by the Federal Reserve Board (even though no hearing is required) and for judicial review of Board decisions in the courts of appeals worked a *pro tanto* repeal of the Clayton Act. The same reasoning, however, was rejected by the Court in *Houston* (Slip Opinion, pp. 5, 7):

> Prior to the 1966 Act administrative approval of bank mergers was necessary. Yet in an antitrust action later brought to enjoin them we never stopped to consider what weight, if any, the

agency's determination should have in the antitrust case. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *First National Bk. & Tr. Co.*, 376 U.S. 665. Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure. *United States* v. *Radio Corporation of America*, 358 U.S. 334; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651; *United States* v. *Philadelphia National Bank, supra*; *United States* v. *First National Bk. & Tr. Co., supra*. We have found no indication that Congress designed judicial review differently under the 1966 Act than had earlier obtained.

* * * * *

Immunity from antitrust laws "is not lightly implied." *California* v. *Federal Power Commission*, 369 U.S. 482, 485. And the grant of administrative power to give immunity unless the agency's decision is arbitrary, capricious, or unsupported by substantial evidence, would be a long step in that direction. Moreover, the Comptroller's action is informal, no hearings in the customary sense being held prior to the 1966 Act (*United States* v. *Philadelphia National Bank, supra*, at 351) and none being required by Congress in the 1966 Act. We would therefore have to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even though no hearing had been held and no record in the customary sense created.

> The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal. That was the practice prior to the 1966 Act; and we cannot find a purpose on the part of Congress to change the rule.

The Federal Reserve Board's role under the Bank Holding Company Act of 1956 is analogous to that of the Comptroller and other banking agencies under the Bank Merger Act of 1966, and for the reasons outlined in *Houston Bank* it is plain, we submit, that Congress never intended the Board's decisions under the former Act to preempt the antitrust jurisdiction of the district courts.

In the light of the *Houston* case and the authorities discussed in our jurisdictional statement, we renew our contention that the district court plainly erred in dismissing this case for lack of jurisdiction.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE, 1967

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 27 1967
JOHN F. DAVIS, CLERK

IN THE

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October Term, 1966

No. — 1017

UNITED STATES OF AMERICA,

Appellant,

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK and the BANK OF COMMERCE,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. —

UNITED STATES OF AMERICA,

Appellant,

v.

MARSHALL & ILSLEY BANK STOCK CORPORATION, MARSHALL & ILSLEY BANK, NORTHERN BANK and the BANK OF COMMERCE,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move this Court to dismiss the above entitled appeal or affirm the judgment of dismissal entered on June 15, 1966 in the above entitled action, which involved only Section 7 of the Clayton Act. The opinion of the United States District Court for the Eastern District of Wisconsin is set forth in the Government's "Jurisdictional Statement" and is reported in 255 F. Supp. commencing at page 273.

QUESTION PRESENTED

In its Notice of Appeal, as compared to the "Question Presented" set forth on page 2 of its Jurisdictional Statement (hereinafter referred to as JS p. .....), it is stated:

> "The question presented by this appeal is:
>
> Whether the Bank Holding Company Act, previous to its amendment in 1966, deprived the district courts of jurisdiction over suits by the United States under Section 15 of the Clayton Act challenging under Section 7 thereof bank holding company acquisitions approved by the Federal Reserve Board?"

ARGUMENT

1. This appeal was taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 USC 29. This Court held in *Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors and Publishers,* 375 U.S. 39 (1963), at page 40, in respect to said Expediting Act:

> "The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. See 36 Cong. Rec. 1679 (1903)".

Conclusive as to whether this litigation is of "great importance", are the following circumstances:

> (a) the concession by the Government (JS p. 13) that "* * * this is the only pending antitrust suit attacking acquisitions by a bank holding company * * *" and that "* * * the legal issue presented here may be of limited importance";

(b) the Congressional validation as to the Clayton Act by the enactment of the 1966 amendments to the Bank Holding Company Act of 1956 of *all bank stock acquisitions consummated prior to July 1, 1966, except those of Appellees,* i.e., all bank stock acquisitions

> "consummated at any time *prior or subsequent* to May 9, 1956, and *as to which no litigation was initiated* by the Attorney General *prior to the date of the enactment of this amendment* shall be *conclusively* presumed not to have been in violation of any antitrust laws other than * * * *" Section 2 of the Sherman Antitrust Act. (Section 11(d) JS p. 54a). (Italics added)

(c) the promulgation by the Congress of a new substantive rule of law governing the Federal Reserve Board (Board) in its determination as to the legality under the Clayton Act of a proposed bank stock acquisition after July 1, 1966 (Subsection (c) of Section 3 of the Bank Holding Company Act of 1956 as amended; JS p. 52a). This rule is also made binding upon the courts which are vested with the jurisdiction to *"review de novo"* Board decisions approving bank stock acquisitions. (Section 11(b) of the Bank Holding Company Act as amended; JS p. 53a.)

(d) the Government asserts at JS p. 13 that, while "the legal issue presented here may be of limited importance", the litigation is however "of substantial significance because it affects an influential industry in one of the nation's large metropolitan centers."

The Government supports this claim only by repeated reference to the Milwaukee banking concentration.

Absent a claim that the banking concentration in Milwaukee is the highest or almost the highest, among comparable areas, the Government's allegations as to concentration are not probative as to this litigation being of "great and general importance". Data as to banking concentration in other comparable areas of the United States based on deposits was attached to the Appellees' Answer as Exhibit B and was received in evidence as Exhibit 77. (Tr. 227-8)

The City of Milwaukee had a 1960 census population of 741,324. Banking concentration on the basis of the three largest banks and of the four largest banks in twelve cities in the 500,000 to 900,000 population range, and in the counties in which said cities are located, was taken (except population data) from Polk's Bank Directory of March, 1960. (Government figures in the Complaint also correspond to those in Polk's Bank Directory.) On this basis, in respect to total deposits as of December 31, 1959, the banking concentrations of the City and County of Milwaukee as compared with such other cities and counties were as follows:

	Percentage of Total Deposits — Three Largest Banks		Percentage of Total Deposits — Four Largest Banks	
Cities	City	County	City	County
Boston	83.0	82.4	91.0	90.3
Buffalo	96.7	91.6	99.4	94.1
Cincinnati	84.8	81.4	96.9	93.1
Cleveland	78.7	78.7	90.3	90.3
Dallas	83.6	81.0	87.3	84.7
Milwaukee	76.6[a]	68.1[b]	80.3[c]	71.4[d]
New Orleans	83.4	83.4	94.5	94.5
Pittsburgh	92.3	81.7	96.1	85.7
St. Louis	62.2	51.5	67.6	56.0
San Antonio	67.5	66.9	73.1	72.5
Seattle	88.3	86.9	96.5	95.0
Washington, DC	74.4	—	82.3	—

[a]Ninth [b]Ninth [c]Tenth [d]Eleventh

Substantially the same standing for Milwaukee is shown, based on assets, in Exhibit A of Appellees' Answer, received as Exhibit 76 at the trial, and based on loans and discounts in Exhibit C of Appellees' Answer, received as Exhibit 78 at the trial. (Tr. pp. 227-8)

Manifestly the low standing of the banking concentration in Milwaukee does not *ipso facto* support a contention that this litigation is of great or of general importance. While said relative standing might not be material on the merits, it is relevant and critical on a motion to dismiss the appeal because the litigation is not of "great or general importance".

A reversal of the trial court's decision would have no general or prospective effect. The bank stock acquisitions by Marshall & Ilsley Bank Stock Corporation heretofore approved by the Board would then have to be *reviewed de novo* pursuant to the new rule of substantive law promulgated by the 1966 amendment to the Bank Holding Company Act of 1956. Incidentally, this substantive rule of law is identical with that in the Bank Merger Act of 1966. With respect to any future acquisitions by Marshall & Ilsley Bank Stock Corporation, they must, to be consummated, be approved by the Board after testing them by the new rule of substantive law, and will be also subject to *review de novo* by the courts on application by the Department of Justice. (See Section 11(b) of Bank Holding Company Act of 1956, as amended, JS p. 53a.) There is no support in this record for the contention that this litigation is of "great and general importance", a jurisdictional prerequisite to an appeal under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 USC 29.

2. The United States District Court for the Eastern District of Wisconsin dismissed this action on June 15,

1966 on the basis of this Court's determination in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), as to the Congressional intent in the enactment of the Bank Holding Company Act of 1956. While the trial court's opinion sets forth the legislative history evidencing said Congressional intent in great detail, it is merely cumulative support of the conclusion reached by this Court in the *Whitney Bank* case wherein this Court cited said legislative history at p. 420.

The Government now acknowledges (JS p. 13) that this Court held in the *Whitney Bank* case that the Board "had 'original exclusive jurisdiction'" at least as to some of the statutory standards prescribed by the Bank Holding Company Act of 1956. However, no attempt is made by the Government to demonstrate that Chief Judge Tehan erred in his decision in this case in relying upon and applying this Court's ruling in the *Whitney Bank* case and holding "* * * the jurisdictional question here presented has been decided by the Supreme Court in the *Whitney Bank* case". (JS p. 31a)

The jurisdictional determination of this Court in the *Whitney Bank* case and of the judgment of the United States District Court for the Eastern District of Wisconsin on June 15, 1966 in the instant case, was superseded on July 1, 1966 by said 1966 amendment of the Bank Holding Company Act of 1956.

In addition to the jurisdiction vested in the Board by the Bank Holding Company Act of 1956, the Clayton Act had vested in the Board the duty of enforcing Section 7 of the Clayton Act where applicable to banks, banking associations and trust companies. See Section 11 of the Clayton Act, 15 USC 21(a). Furthermore, this

Court expressly held that neither the 1950 amendment to the Clayton Act nor the Bank Merger Act of 1960 modified this antitrust jurisdiction of the Board as to bank stock acquisitions, although the Bank Merger Act of 1960 had done so as to the Board's judisdiction over bank mergers. See *United States v. Philadelphia National Bank,* 374 U.S. 321, at pp. 344-345, note 22, (1963).

With the approval of the Board, in which such dual jurisdiction is vested, the acquisition of the stock of Marshall & Ilsley Bank and of Northern Bank was consummated December 2, 1959, but only after a postponement at the request of the Department of Justice to permit it to investigate and review a possible violation of Section 7 of the Clayton Act if said bank stock acquisitions were consummated. Furthermore, said acquisitions were consummated only after review and advice by the Department of Justice that it had no objection to a proposed letter from the President of the proposed bank holding company to prospective stockholders of the holding company. A copy of that letter was received in evidence without objection as a part of Exhibit 128 (Tr. p. 1347) and contained the following statement:

> "You will recall from our letters of October 29 and November 12 that the Antitrust Division of the Department of Justice asked us to postpone the effectiveness of the exchange until the Division had an opportunity to study possible antitrust aspects of the transaction. We have furnished the data requested by the Antitrust Division of the Department of Justice and have had conferences with representatives of the Department. We have been advised that in view of the circumstances involved the Department of Justice will take no action to prevent consummation of the exchange of stocks of the two banks for stock of Bank Stock Corporation, and has no intention of attempting to set this aside after consummation."

Government counsel at the trial agreed "That we had no objection to the form of the letter." (Tr. p. 1357)

As to the acquisition of the stock of Bank of Commerce, the Department of Justice in two successive briefs filed with the Board opposed said acquisition as violative of Section 7 of the Clayton Act. The Board specifically rejected this contention stating: "* * * it is the Board's judgment that the acquisition would not result in a substantial lessening of competition or tend to create a monopoly." See relevant portion of the tentative Board decision dated December 29, 1960 in Appendix 1 of this Brief; see also portion of final decision dated January 25, 1961 in Appendix 2 of this Brief. Clearly the following statements in the "Jurisdictional Statement" are incomplete, if not incorrect:

> "* * * it [the Board] did not purport to apply Section 7 of the Clayton Act, * * *." (JS p. 4)

and

> "We note preliminarily that in approving the acquisitions involved here the Board did not purport to exercise any jurisdiction under Section 7." (JS p. 6)

Manifestly, the Department of Justice had ample notice and opportunity to present its opposition to each acquisition here involved on the ground that it would violate Section 7 of the Clayton Act,[1] and yet sought no review pursuant to Section 9 of the Bank Holding Company Act of 1956 (JS p. 51a) when its contention was rejected by the Board.

Nothing in the history of this litigation supports a contention that it is of "great and general importance" and the supersession on July 1, 1966 of the jurisdictional

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[1]See suggestions to the contrary, JS pp. 9, 11 and 12.

rule of the *Whitney Bank* case by the 1966 amendment of the Bank Holding Act of 1956 negates such a contention.

CONCLUSION

In view of the foregoing, the Appellees' Motion to Dismiss or Affirm should be granted.

Respectfully submitted,

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APPENDIX 1

Portion of the TENTATIVE STATEMENT of the Board of Governors of the Federal Reserve System in "APPLICATION BY BANK STOCK CORPORATION OF MILWAUKEE, MILWAUKEE, WISCONSIN, FOR PRIOR APPROVAL OF ACQUISITION OF SHARES OF THE BANK OF COMMERCE, MILWAUKEE, WISCONSIN" published in the Federal Register on January 5, 1961 (26 Federal Register 56)

"Careful consideration has been given to statements filed by the Department of Justice in which it is urged that the application should be denied on the ground that there is a reasonable probability that the proposed acquisition may substantially lessen competition in violation of section 7 of the Clayton Act. However, for the reasons heretofore indicated, it is the Board's judgment that the acquisition would not result in a substantial lessening of competition or tend to create a monopoly."

APPENDIX 2

Portion of STATEMENT of the Board of Governors of the Federal Reserve System in "APPLICATION BY BANK STOCK CORPORATION OF MILWAUKEE, MILWAUKEE, WISCONSIN, FOR PRIOR APPROVAL OF ACQUISITION OF SHARES OF THE BANK OF COMMERCE, MILWAUKEE, WISCONSIN", published in the Federal Reserve Bulletin February, 1961, page 162.

"*Conclusion.*—As noted in the Board's Tentative Statement in this matter, issued in connection with the Notice of Tentative Decision published in the Federal Register on January 5, 1961 (26 Federal Register 56), careful consideration was given to statements filed by the Department of Justice urging denial of this application on the ground that a reasonable probability exists that the proposed acquisition may substantially lessen competition in violation of section 7 of the Clayton Act. Subsequent to the publication of the Board's Notice of Tentative Decision, the Department of Justice filed a further statement urging the Board to reconsider its tentative decision, and to deny the application for the reasons set forth in the previous statements submitted by that Department. The Board, having carefully reconsidered its decision in the light of the objections submitted by the Department of Justice, as well as all relevant facts of record, continues in its judgment that, in the light of the general purposes of the Act and the factors enumerated in section 3(c) thereof, the proposed acquisition would be consistent with the statutory objectives and the public interest and that the application should be approved."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

UNITED STATES *v.* MARSHALL & ILSLEY BANK STOCK CORP ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 1017. Decided May 22, 1967.

PER CURIAM.

The judgment is reversed. Section 11 (e) of the Bank Holding Company Act of 1966, 80 Stat. 236; *United States* v. *First City National Bank of Houston*, 386 U. S. 361.